



STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES

Prevailing Wage
PO Box 44540 • Olympia, Washington 98504-4540
360/902-5335 Fax 360/902-5300

January 3, 2019

Peter B. King
Association of Washington Cities
1076 Franklin Street, SE
Olympia, WA 98501

RE: Landscape Laborer Determination

Dear Mr. King:

L&I received sixteen letters from municipalities (Cities) starting with Kathleen Kline's August 21, 2018 letter on behalf of City of Bellevue. L&I appreciates Cities' and Ms. Kline's interest in prevailing wage matters, her service in representing Association of Washington Cities on the Prevailing Wage Advisory Committee and the content of those letters.

Issues

Cities contend L&I erred in implementing SSB-5493 when it used certain collective bargaining agreements (Agreements) to establish prevailing wages for landscape construction ("Landscape Laborer") under a new law amending RCW 39.12.015:

- (1) All determinations of the prevailing rate of wage shall be made by the industrial statistician of the department of labor and industries.
- (2) The time period for recovery of any wages owed to a worker affected by the determination is tolled until the prevailing wage determination is final.
- (3) Notwithstanding RCW 39.12.010(1), the industrial statistician shall establish the prevailing rate of wage by adopting the hourly wage, usual benefits, and overtime paid for the geographic jurisdiction established in collective bargaining agreements for those trades and occupations that have collective bargaining agreements. For trades and occupations with more than one collective bargaining agreement in the county, the higher rate will prevail.

(4) For trades and occupations in which there are no collective bargaining agreements in the county, the industrial statistician shall establish the prevailing rate of wage as defined in RCW [39.12.010](#) by conducting wage and hour surveys. In instances when there are no applicable collective bargaining agreements and conducting wage and hour surveys is not feasible, the industrial statistician may employ other appropriate methods to establish the prevailing rate of wage.

Cities identified and analyzed two Collective Bargaining Agreements negotiated between Associated General Contractors and District Council of Laborers. Those two agreements are:

- Western and Central Washington Laborers Agreement – Covering nineteen Western and Eastern Washington counties
- Eastern Washington Laborers Agreement – Covering sixteen Eastern Washington counties

Cities contend these Agreements exclude Landscape Laborer, citing passages from those CBAs and from WAC 296-127-01346, and observations of the industry.

Work Affected

Article 2 of both Agreements are entitled “Work Affected” and offer descriptions of the work to which the agreement applies. Article 5 of the Eastern Washington Laborers Agreement contains additional descriptive information. The descriptions are similar but not identical. Cities notice these descriptions and notice the absence of the term “landscape” or “landscaping,” concluding landscape work falls outside the Agreements. I find the work of Landscape Laborer falls under these agreements based on the following:

The negotiators of these agreements report that landscape construction is covered under the agreements.

The main terms in the Work Affected sections of these agreements are “heavy,” “highway” and “building.” These are recurring terms in the industry connoting all categories of construction. Various illustrative examples of construction projects are offered in these Work Affected sections. In my experience, these agreements cover all categories and types of construction.

Heavy, highway, and building construction projects, specifically covered under these agreements, often include landscaping as a portion of the overall construction contract.

That landscaping work is covered under these agreements is illustrated by the presence of the term “Landscape Laborer” in the Eastern Washington Laborers Agreement¹ and the term “Landscaping & Planting & Irrigation Sprinkler Systems” in the Western and Central Washington Laborers Agreement², and wages paid to the landscape construction occupation under the agreements. The title of this occupation, as with the many other occupational titles in these agreements, describes the work performed.

WAC 296-127-01346(2) is written into the Western Washington Laborers Agreement in the opening sentence for Group I workers: “Landscape Construction does not include:”³ The purpose of this passage is the same as its prevailing wage purpose in rule: Landscape Laborer wages are not allowed under the agreement for non-landscaping construction. The presence and content of this provision in this agreement confirms by implication that the agreement does cover Landscape Laborers whose work falls under the definition of landscape construction, such as that work described in WAC 296-127-01346(1).

Subcontracting

Both agreements prohibit signatory contractors from subcontracting work to non-signatory subcontractors. The following provision is in both agreements:⁴

“The employer agrees it will not subcontract or otherwise transfer in whole or in part any work covered by this agreement to be done at the site of the construction, alteration, painting or other repair of a building, structure, or other work unless the person, firm, corporation or other business entity is signatory to this Agreement.”

The Western and Central Washington Laborers Agreement allows an exception to this requirement in certain narrow circumstances. Section 4 of Article 7 in the Western and Central Washington Laborers Agreement reads as follows:

“When the total landscaping portion of a project is under two hundred and seventy five thousand dollars (\$275,000) in value and there is no portion of the landscaping excluded from the project or bid separately, the Employer may waive this provision. For the purpose of this Section, landscaping shall be as currently defined in WAC 296-127-01346.” (emphasis added)

¹ Schedule A, Group I A of Eastern Washington Laborers Agreement

² Schedule A, Section 2 of Western and Central Washington Laborers Agreement

³ Schedule A, Section 2 (Classifications and Wage Scales) of Western and Central Washington Laborers Agreement

⁴ Article 7, Section 1 of Western and Central Washington Laborers Agreement and Article 9.1 of Eastern Washington Laborers Agreement

WAC 296-127-01346 is the prevailing wage definition of Landscape Construction, further supporting that Landscape Laborer work is covered under the agreement by showing that larger landscaping efforts must be performed by signatory contractors. I also notice that this provision does not except any landscaping work from the agreement. Instead, it allows subcontracting to non-signatory subcontractors on smaller landscaping projects. In practice, signatory subcontractors, including signatory prime contractors, sometimes perform Landscape Laborer work and are covered under this agreement when the value is under \$275,000.

Some have wondered whether this subcontracting exception has had the effect of inflating the Landscape Laborer wage under this agreement beyond what it would otherwise be in the absence of the exception. While it might be interesting to know whether this is true, it cannot be confirmed using available data.

Prevailing Wage Rate Changes

Though the Landscape Laborer wage in these agreements is the lowest wage allowed under the agreements, Landscape Laborer prevailing wages changed sharply with implementation of the 2018 revisions to RCW 39.12.015. However, part of the reason for the substantial change is that prior to August 2018, prevailing wages for Landscape Construction were quite modest and arguably not reflective of modern wage standards. The most recent wage and hour survey for this trade was conducted twelve years ago. Some Landscape Construction prevailing wages were recalculated at that time but, where no data or insufficient data was submitted, other rates were not recalculated. Because of this, some Landscape Construction prevailing wages had been calculated more than twelve years ago. There also had been no cost of living adjustments in the interim, though many had been adjusted so as to not fall below the state's minimum wage. The majority of Landscape Construction prevailing wages reflected the state's minimum wage of \$11.50. But actual wages paid for landscaping in Washington State were likely higher than the prevailing wages.

New Law

Cities have questioned whether Landscape Laborer prevailing wages reflect the wages paid to the majority of those workers in those Washington counties, but under the new law, that requirement is considered only if Landscape Laborer does not have a collective bargaining agreement.

While “prevailing rate of wage” is defined in RCW 39.12.010(1) as the wage paid to the majority of workers in a trade or occupation, in each county, the relevant 2018 changes to RCW 39.12.015 sets that definition aside for occupations that have a collective bargaining agreement, such as Landscape Laborers. RCW 39.12.015 provides that:

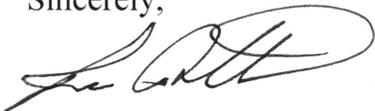
Notwithstanding RCW [39.12.010](#)(1), the industrial statistician shall establish the prevailing rate of wage by adopting the hourly wage, usual benefits, and overtime paid for the geographic jurisdiction established in collective bargaining agreements for those trades and occupations that have collective bargaining agreements.

Use of the term “notwithstanding” clarifies the legislature’s intent to set aside the RCW 39.12.010(1) definition of prevailing rate of wage where a trade or occupation has a collective bargaining agreement. Landscape Laborer is an occupation within the agreements discussed here.⁵ Accordingly, prevailing wages now reflect the Landscape Laborer wages, benefits and overtime from those agreements.

Some Cities have suggested the new law’s effect on Landscape Laborer prevailing wages, and on Cities’ budgets, was unintended. L&I has received input from other (non-landscaping) industries wondering whether the new law’s effect on “residential” prevailing wages, which will affect the affordable housing industry, were unintended. Still others wonder if the effect on ship-building prevailing wages was unintentional. As with Landscape Laborer, these other trades and occupations have collective bargaining agreements and thus the wage rates established in those agreements were adopted as the prevailing wage. The new law is clear. If some effects of the new law were not intended, the upcoming legislature may consider further amendments to RCW 39.12.015.

I appreciate your interest in prevailing wage matters and your concerns about fiscal impacts of the new law, and I regret the absence of an ‘administrative’ remedy not requiring legislative action. Please do not hesitate to contact me with further questions or concerns.

Sincerely,



Jim P. Christensen
Prevailing Wage Program Manager/Industrial Statistician
360.902.5338
Jim.Christensen@lni.wa.gov

⁵ Schedule A, Group I A of Eastern Washington Laborers Agreement; Schedule A, Section 2 of Western and Central Washington Laborers Agreement

RCW 39.12.015**Industrial statistician to make determinations of prevailing rate.**

(1) All determinations of the prevailing rate of wage shall be made by the industrial statistician of the department of labor and industries.

(2) The time period for recovery of any wages owed to a worker affected by the determination is tolled until the prevailing wage determination is final.

(3) Notwithstanding RCW 39.12.010(1), the industrial statistician shall establish the prevailing rate of wage by adopting the hourly wage, usual benefits, and overtime paid for the geographic jurisdiction established in collective bargaining agreements for those trades and occupations that have collective bargaining agreements. For trades and occupations with more than one collective bargaining agreement in the county, the higher rate will prevail.

(4) For trades and occupations in which there are no collective bargaining agreements in the county, the industrial statistician shall establish the prevailing rate of wage as defined in RCW 39.12.010 by conducting wage and hour surveys. In instances when there are no applicable collective bargaining agreements and conducting wage and hour surveys is not feasible, the industrial statistician may employ other appropriate methods to establish the prevailing rate of wage.

[2018 c 248 § 1; 2018 c 242 § 1; 1965 ex.s. c 133 § 2.]

NOTES:

Reviser's note: This section was amended by 2018 c 242 § 1 and by 2018 c 248 § 1, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

RCW 39.12.010**Definitions.**

(1) The "prevailing rate of wage", for the intents and purposes of this chapter, shall 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 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 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 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 include 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.

[1989 c 12 § 6; 1985 c 15 § 1; 1965 ex.s. c 133 § 1; 1945 c 63 § 3; Rem. Supp. 1945 § 10322-22.]

NOTES:

Severability—1985 c 15: See note following RCW 39.12.065.

WAC 296-127-01346

Landscape construction.

For the purposes of the Washington state public works law, chapter 39.12 RCW, landscape construction involves the beautification of a plot of land by changing its natural features through the addition or modification of lawns, trees, bushes, etc.

(1) Landscape construction includes:

- Constructing or maintaining lawns, yards, gardens or other landscaped surfaces.
- Mixing and spreading mulches, ground covers, soil amendments, decorative bark or decorative rock.
- Seeding, sodding or hydroseeding.
- Applying chemicals or fertilizers.
- Planting trees, shrubs or plants.
- Installing, servicing or repairing above ground lawn or landscape sprinkler systems.
- Installing, servicing or repairing underground lawn or landscape sprinkler systems to a maximum depth of three feet below finish grade.
- Assembling or placing premanufactured trellis work, play equipment, benches or picnic tables.
- Constructing rock walls to a maximum height of four feet.
- Land clearing.
- Spreading top soil to a maximum depth of six inches below finish grade.
- Trenching to a maximum depth of three feet below finish grade.
- Installing french drains or other subsurface water collection systems to a maximum depth of three feet below finish grade.
- Hauling top soil, plants or other landscaping materials in trucks with only one rear axle.

(2) Landscape construction does not include:

- Any activity or task (including those mentioned above) when performed preparatory to any nonlandscaping construction work.
- Constructing roads, footpaths, trails or rock walls more than four feet high.
- Custom fabrication of trellis work, play equipment, benches or picnic tables.
- Constructing restrooms, shelters or similar structures.
- Installing sewer systems, storm sewer systems, catch basins, vaults or drainage systems for impervious surfaces (such as parking lots).
- Installing drainage systems or underground sprinkler systems more than three feet below final grade.
- Land clearing, dozing, grading, excavating or hauling except as permitted above.
- Tree falling or bucking.
- Subgrade preparation.
- The use of power equipment with more than ninety horsepower.
- The use of trucks with more than one rear axle except hydroseeders.
- Demolition of structures.
- Asphalt or concrete work except incidental anchorage for play equipment, benches or picnic tables.
- Welding.
- Installing agricultural irrigation systems.

- Encapsulation of landfills.

[Statutory Authority: Chapter 39.12 RCW, RCW 43.22.270 and 43.22.051. WSR 00-15-077, § 296-127-01346, filed 7/19/00, effective 7/19/00.]

Prevailing Wage Determination Request and Review Process

RCW 39.12.015 is the basis for requesting a determination, since it provides:

All determinations of the prevailing rate of wage shall be made by the industrial statistician of the department of labor and industries.

If you disagree with a determination the industrial statistician provides, WAC 296-127-060(3) provides for a review process:

(3) Any party in interest who is seeking a modification or other change in a wage determination under RCW 39.12.015, and who has requested the industrial statistician to make such modification or other change and the request has been denied, after appropriate reconsideration by the assistant director shall have a right to petition for arbitration of the determination.

(a) For purpose of this section, the term "party in interest" is considered to include, without limitation:

(i) Any contractor, or an association representing a contractor, who is likely to seek or to work under a contract containing a particular wage determination, or any worker, laborer or mechanic, or any council of unions or any labor organization which represents a laborer or mechanic who is likely to be employed or to seek employment under a contract containing a particular wage determination, and

(ii) Any public agency concerned with the administration of a proposed contract or a contract containing a particular wage determination issued pursuant to chapter 39.12 RCW.

(b) For good cause shown, the director may permit any party in interest to intervene or otherwise participate in any proceeding held by the director. A petition to intervene or otherwise participate shall be in writing, and shall state with precision and particularity:

(i) The petitioner's relationship to the matters involved in the proceedings, and

(ii) The nature of the presentation which he would make. Copies of the petition shall be served on all parties or interested persons known to be participating in the proceeding, who may respond to the petition. Appropriate service shall be made of any response.

If you choose to utilize this review process, you must submit your request within 30 days of the date of the applicable industrial statistician's determination or response to your request for modification or other change. Include with your request any additional information you consider relevant to the review.

Direct requests for determinations, and for modification of determinations via email or letter to the prevailing wage industrial statistician:

Jim P. Christensen
Industrial Statistician/Program Manger
Department of Labor & Industries
Prevailing Wage
P O Box 44540
Olympia, WA 98504-4540
Jim.Christensen@Lni.wa.gov

Prevailing Wage Determination Request and Review Process

Direct requests via email or letter seeking reconsideration (redetermination) by the assistant director to:

Elizabeth Smith, Assistant Director
Department of Labor & Industries
Fraud Prevention and Labor Standards
P O Box 44278
Olympia, WA 98504-4278
Elizabeth.Smith@Lni.wa.gov

Direct petitions for arbitration to:

Joel Sacks, Director
Department of Labor & Industries
P O Box 44001
Olympia, WA 98504-4001

If you choose to utilize this arbitration process, you must submit your request within 30 days of the date of the applicable assistant director's decision on reconsideration (redetermination). Submit an original and two copies of your request for arbitration to the Director personally, or by mail. The physical address for the Director is 7273 Linderson Way, SW, Tumwater, WA 98501.

WAC 296-127-061 also contains the following provisions regarding petitions for arbitration:

In addition, copies of the petition shall be served personally or by mail upon each of the following:

- (a) The public agency or agencies involved,
 - (b) The industrial statistician, and
 - (c) Any other person (or the authorized representatives of such person) known to be interested in the subject matter of the petition.
- (2) The director shall under no circumstances request any administering agency to postpone any contract performance because of the filing of a petition. This is a matter which must be resolved directly with the administering agency by the petitioner or other party in interest.
- (3) A petition for arbitration of a wage determination shall:
- (a) Be in writing and signed by the petitioner or his counsel (or other authorized representative), and
 - (b) Identify clearly the wage determination, location of project or projects in question, and the agency concerned, and
 - (c) State that the petitioner has requested reconsideration of the wage determination in question and describe briefly the action taken in response to the request, and
 - (d) Contain a short and plain statement of the grounds for review, and
 - (e) Be accompanied by supporting data, views, or arguments, and
 - (f) Be accompanied by a filing fee of \$75.00. Fees shall be made payable to the department of labor and industries.



1076 Franklin Street SE • Olympia, WA 98501-1346

November 16, 2018

Joel Sacks, Director
Department of Labor & Industries
7273 Linderson Way SW
Tumwater, WA 98501

DR Fraud Prev.
DEPARTMENT *dw. 12/18/18*
RECEIVED

DEC 03 2018

DIRECTOR'S OFFICE
DEPT OF LNI - OLYMPIA, WA

RE: City Inquiries on the recent prevailing wage update

Dear Mr. Sacks:

As you are aware, cities are experiencing double and tripling of rate increases for landscape laborers as a result of the Department's implementation of SSB 5493. Cities across the state are concerned with the size of this increase and believe that the process to establish the new rate may have been flawed.

In August of 2018, the City of Bellevue sent an inquiry to Jim Christensen seeking clarification in the process and how the determination of the wage rate was created. By November 6, 2018 L&I indicated that at least 10 cities sent inquiries concerning increases to the landscape laborer prevailing wage.

To date, cities have received no response to these inquiries.

Cities are in the process of finalizing budgets for 2019 and need clarification to the cost of service. A number of cities may need to cancel projects and contracts as a result of the dramatic increase. Please note cities are not opposing any increase in the prevailing wage rate for landscape laborers, but we believe that the comparables used are not an accurate reflection of the work cities generally contract for.

Cities need to be able to effectively plan and set contracts for the next fiscal year and it is critical they have the best information available. A lack of a timely response is preventing cities from planning effectively.

AWC is asking L&I for a timely response to requests from cities regarding their questions into the increase rate for landscape laborers.

Thank you for your attention to this concern.

Sincerely,

Peter B. King
Chief Executive Officer

cc: Candice Bock, Director of Government Relations