

ILLINOIS' PREVAILING WAGE LAW

***Separating Fact From Fiction
and there's a lot of fiction...***

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Attorney Jeff Risch represents employers in all facets of labor & employment law related matters. Mr. Risch has been on the forefront of prevailing wage disputes and controversies; including the litigation of such matters at the Department of Labor level and in the courts. Through the years Mr. Risch has developed professional relationships with DOL investigators and officials, Assistant Attorney Generals, Judges, and Lawyers in order to help assist clients in related controversies as expeditiously and cost effectively as possible. Mr. Risch currently serves as the *Chairperson for the Illinois Chamber's Employment Law & Litigation Committee*; serves as *Chapter Labor Attorney for the Associated Builders & Contractors*; and is the retained *Attorney of Record for Illinois' Drug Free Workplace Program*. Having spent years in business management as General Counsel for a major material handling distributor, Mr. Risch offers labor & employment advice to business owners, human resource professionals and fellow attorneys in a practical, cost effective and common sense fashion.

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Overview of the Illinois Prevailing Wage Act --- as Amended:

Generally speaking, the Illinois Prevailing Wage Act (820 ILCS 130/0.01 et. seq.) ("IPWA" or the "Act") requires contractors and subcontractors to pay laborers, workers and mechanics employed on "*public works*" projects in Illinois no less than the general prevailing rate of wages (consisting of hourly cash wages plus fringe benefits) for work of similar character in the *locality* (locality usually means the county) where the work is performed.

As of August 21, 2007, this work now includes any maintenance, repair, assembly or disassembly work performed on equipment whether owned, leased or rented. See 820 ILCS 130/0.01 et. seq.

On July 23, 2009, Governor Quinn signed PA 96-0058 - an amendment to Illinois' prevailing wage law that arguably expands the law's coverage and scope.

Brief History: Having handled hundreds of prevailing wage matters over the years, certain interest groups as well as the Illinois Department of Labor ("IDOL") would argue that Illinois case law and Attorney General opinion letters support the notion that the Illinois Prevailing Wage Act ("IPWA") (820 ILCS 130) applied to construction projects undertaken by purely private entities which receive funds, monies or grants from the State. In other words, purely private entities receiving State financial assistance often found themselves being forced to observe Illinois' expansive prevailing wage requirements. *Relying on Illinois Attorney General Opinion 97-014, July 7, 1997, 1997 WL 398809; Illinois Attorney General Opinion 00-018, December 29, 2000, 2000 WL 33152172; Opportunity Center of Southeastern Illinois v. Bernardi, 204 Ill. App. 3d 945, 562 N.E.2d 1053 (5th Dist. 1990); Bernardi v. Illini Community Hospital, 163 Ill. App. 3d 987, 516 N.E.2d 1320 (4th Dist. 1987).* However, the law's application to local TIF-Districts, local Business Development Districts, local Special Service Areas and other local enterprise zones containing special tax breaks or financial incentives for private development was not settled; and therefore, the State of Illinois' enforcement agency (the IDOL) would typically not enforce the IPWA on these unique private development projects.

New Law: In an attempt to codify the opinions referenced above and broaden the application of the law to private enterprise, SB223 was signed into law by Governor Quinn on July 23, 2009 as PA 96-0058. Essentially, PA 96-0058 amends the definition of "public works" contained in the IPWA to include *all projects financed in whole or in part with bonds, grants, loans or other funds made available by and through the State or any of its political subdivisions*. What's interesting is that certain interests wanted the State Legislature to pass a bill that specifically referenced TIF-Districts, enterprise zones, etc... but was unsuccessful in doing so. But, through the more vague and open-ended legislation introduced through SB223, these interest groups may have been able to get what it originally hoped for and intended. What's certain, based purely on experience

and rumblings, is that the language contained in PA 96-0058 will undoubtedly invite BIG Labor to increase pressure on local and State officials to apply the IPWA on purely private projects that indirectly receive financial assistance from a local body of government.

The Net Effect: It's way too early to predict how PA 96-0058 will play out in the courts or before the IDOL. At this time, any and all contractors doing business in Illinois should become intimately familiar with Illinois' prevailing wage law (including the IDOL's history of administering and enforcing the law up to now). Also, local units of government need to consider the impact of this new language and weigh the pros/cons in providing *any* financial assistance in private development projects going forward. Furthermore, all private construction contracts should be reviewed carefully for language addressing the effect of a contemplated private project being deemed to fall under the IPWA's scope and coverage. The bottom line (for now)... starting January 1, 2010 certain interests will use PA 96-0058 to its greatest advantage --- that is to argue the IPWA's application to as many private projects as possible.

NOTE: PA 96-0058 does clarify that work done directly for a public utility company, whether or not done under public supervision or direction, or paid for wholly or in part out of public funds; or projects undertaken by the owner of an owner-occupied single-family residence or at an owner-occupied unit of a multi-family residence shall not be included as falling under the law's coverage.

NOTE: The IPWA has been repeatedly challenged on constitutional grounds, and it has been repeatedly upheld by Illinois courts. See *Bernardi v. Roofing Systems, Inc.*, 101 Ill.2d 424, 463 N.E.2d 123 (1984) (for now... the IPWA does not violate the due process or equal protection clause of the Illinois or U.S. Constitution). Also... various pre-emption arguments have been made against prevailing wage laws (i.e. can't regulate motor carrier wages per U.S. DOT regulations and wage/hour law) --- ALL TO NO AVAIL! See *Frank Bros., Inc. v. WI DOT*, 409 F.3d 880 (7th Cir. 2005) (holding that Davis Bacon and its related Acts do not preempt state prevailing wage laws).

Key Definitions of the IPWA:

Public works means:

"Public works" means all fixed works constructed by any public body, other than work done directly by any public utility company, whether or not done under public supervision or direction, or paid for wholly or in part out of public funds. "Public works" as defined herein includes all projects financed in whole or in part with bonds issued under the Industrial Project Revenue Bond Act (Article 11, Division 74 of the Illinois Municipal Code), the Industrial Building Revenue Bond Act, the Illinois Finance Authority Act, the Illinois Sports Facilities Authority Act, or the Build Illinois Bond Act, and all projects financed in whole or in part with loans or other funds made available pursuant to the Build Illinois Act. "Public works" also includes all projects financed in

whole or in part with funds from the Fund for Illinois' Future under Section 6z-47 of the State Finance Act, funds for school construction under Section 5 of the General Obligation Bond Act, funds authorized under Section 3 of the School Construction Bond Act, funds for school infrastructure under Section 6z-45 of the State Finance Act, and funds for transportation purposes under Section 4 of the General Obligation Bond Act. "Public works" also includes all projects financed in whole or in part with funds from the Department of Commerce and Economic Opportunity under the Illinois Renewable Fuels Development Program Act for which there is no project labor agreement. "Public works" also includes all projects at leased facility property used for airport purposes under Section 35 of the Local Government Facility Lease Act.

As referenced above, PA 96-0058 amends the definition of "public works" contained in the IPWA to include *all projects financed in whole or in part with bonds, grants, loans or other funds made available by and through the State or any of its political subdivisions.*

NOTE: Illinois case law, as well as prior Illinois Attorney General Opinions, makes it clear that the IPWA applies to construction projects undertaken by non-governmental entities which either receive public funds or receive public grants or "connected" to a public entity. In other words, purely private entities receiving public grant assistance and/or receive public financial support will find themselves observing Illinois prevailing wage requirements when, for example, constructing a new building, remodeling an existing structure or calling the plumber to come out and fix a clogged toilet. See Illinois Attorney General Opinion 00-018, December 29, 2000, 2000 WL 33152172. See also Opportunity Center of Southeastern Illinois v. Bernardi, 204 Ill. App. 3d 945, 562 N.E.2d 1053 (5th Dist. 1990) (remodeling work to private hospital = prevailing wage since hospital received local tax monies and state grants). See also Bernardi v. Illini Community Hospital, 163 Ill. App. 3d 987, 516 N.E.2d 1320 (4th Dist. 1987) (the new canopy for the private hospital's emergency entrance = prevailing wage obligations since hospital received public funding and local tax revenues). Also, purely private entities financially supporting the "construction" of public buildings can find themselves obligated to conform to the IPWA's requirements. See Illinois Attorney General Opinion 97-014, July 7, 1997, 1997 WL 398809 (purely private foundation to financially support, in whole, local community college's new International Building = prevailing wage requirements since the use of the building will be for public use on public land).

Construction means:

"Construction" means all work on public works involving laborers, workers or mechanics. This includes any maintenance, repair, assembly, or disassembly work performed on equipment whether owned, leased, or rented.

Locality means:

"Locality" means the county where the physical work upon public works is performed, except (1) that if there is not available in the county a sufficient number of competent skilled laborers, workers and mechanics to construct the public works efficiently and

properly, "locality" includes any other county nearest the one in which the work or construction is to be performed and from which such persons may be obtained in sufficient numbers to perform the work and (2) that, with respect to contracts for highway work with the Department of Transportation of this State, "locality" may at the discretion of the Secretary of the Department of Transportation be construed to include two or more adjacent counties from which workers may be accessible for work on such construction.

Public Body means:

"Public body" means the State or any officer, board or commission of the State or any political subdivision or department thereof, or any institution supported in whole or in part by public funds, and includes every county, city, town, village, township, school district, irrigation, utility, reclamation improvement or other district and every other political subdivision, district or municipality of the state whether such political subdivision, municipality or district operates under a special charter or not.

General Prevailing Rate of Hourly Wages/General Prevailing Rate of Wages means:

The terms "general prevailing rate of hourly wages", "general prevailing rate of wages" or "prevailing rate of wages" when used in this Act mean the hourly cash wages plus fringe benefits for training and apprenticeship programs approved by the U.S. Department of Labor, Bureau of Apprenticeship and Training, health and welfare, insurance, vacations and pensions paid generally, in the locality in which the work is being performed, to employees engaged in work of a similar character on public works.

The Bottom Line... is that the Act requires that all laborers, workers and mechanics employed by contractors or subcontractors in actual "*construction work*" on the site of the building or construction job, must be paid the prevailing wage (hourly plus fringes). *Construction work* means all work on "*public works*" (*see above*) involving laborers, workers and/or mechanics, including those individuals who simply transport materials and equipment to or from a job site, and now including any maintenance, repair, assembly or disassembly work performed on equipment whether owned, leased or rented. The only expressed exception to the definition of covered "construction work" is limited to the transportation by the actual sellers and suppliers of materials or equipment or the manufacture or processing of materials or equipment. This exception, however, is extremely narrow and has been applied on a very limited basis by the Illinois Department of Labor. Additionally, recent amendments to the Act require employers to pay prevailing wage for simple "maintenance" or "repair" work performed on any public building. The Act now reads that the wage for a tradesman performing "maintenance" is equivalent to that of a tradesman engaged in "construction."

Key Requirements of the IPWA (As Applicable to Contractors):

1) PAY THE PREVAILING WAGE (HOURLY PLUS FRINGES)

Assuming that the law applies (*and it's the sole responsibility of the contractor or subcontractor to know whether or not the law applies regardless of notice from anyone*), any employer who has workers engaged in a particular project must not only pay the prevailing hourly rate, but must also be sure to pay each worker the prevailing set of fringe benefits. The prevailing hourly rate and prevailing fringe benefits are based on the type of work being performed (i.e. electrical vs. communication systems technician; or laborer vs. fence erector) as well as the particular county where the work is being performed (i.e. Cook County or DuPage County).

NOTE: Hourly rate PLUS fringe benefits means that the hourly prevailing wage rate must be met while the fringe benefits can be combined. In other words, if the published prevailing wage hourly rate is, for example, \$20/hr, plus \$2/hr for health/welfare and \$1/hr for pension/retirement, the employer must pay the worker at least \$20/hr plus contribute \$3/hr in health/welfare and/or pension/retirement benefits. The employer CANNOT pay the worker \$18/hr and contribute \$5/hr in health/welfare and/or pension/retirements benefits. See Illinois Attorney General Opinion 93-009, March 29, 1993, 1993 WL 107971.

NOTE: Government employees need not receive the “prevailing wage” for similar work performed by a private employee. In other words, without limitation and without exception, public employees shall not receive the prevailing wage for “construction work” since the IPWA only applies to contractual work. See Seybold v. City of Chicago, 7 Ill. App. 3d 932, 288 N.E.2d 899 (1st Dist. 1972). See also Illinois Attorney General Opinion 84-013, September 13, 1984, 1984 WL 60044. See also Bradley v. Casey, 415 Ill. 576, 114 N.E.2d 681 (1953).

NOTE: Failure to pay “fringe benefits” under the IPWA may be pre-empted by the Employee Retirement Income Security Act of 1974 (ERISA). See Laborers v. James McHugh Construction Co., 230 Ill. App. 3d 939, 596 N.E.2d 19 (1st Dist. 1992)(union's claim that employer failed to pay fringe benefits required under the IPWA was preempted by the ERISA).

2) POST PREVAILING WAGE RATES AT THE WORK SITE

Also, the contractor or construction manager to whom a contract for public works is awarded must now post, at a location on the project site of the public works that is easily accessible to the workers engaged on the project, the prevailing wage rates for each craft or type of work or mechanic needed to execute the contract or project or work to be performed. Per sources at the IDOL, it's “ok” to post the prevailing wage rates in a binder or booklet and give it to the workers --- especially in light of potential “sabotage” from certain third parties.

3) *SERVE NOTICE ON LOWER TIERED CONTRACTORS*

Contractors are also under an obligation to inform and serve written notice upon any subcontractor that a particular project is covered under the Act. It shall be mandatory upon the contractor to whom the contract is awarded to insert into each subcontract and into the project specifications for each subcontract a written stipulation to the effect that not less than the prevailing rate of wages shall be paid to all laborers, workers, and mechanics performing work under the contract. It shall also be mandatory upon each subcontractor to cause to be inserted into each lower tiered subcontract and into the project specifications for each lower tiered subcontract a stipulation to the effect that not less than the prevailing rate of wages shall be paid to all laborers, workers, and mechanics performing work under the contract. Failure to provide such notice also subjects the contractor to liability under the Act --- it's a violation!

4) *MAINTAIN, PRESERVE AND SUBMIT ACCURATE RECORDS*

Contractors must make and keep for a period of no less than 3 years, records of all laborers, mechanics, and other workers employed by them on the project; the records shall include each worker's name, address, telephone number when available, social security number, classification or classifications, the hourly wages paid in each pay period, the number of hours worked each day, and the starting and ending times of work each day. On a related note, all records concerning prevailing wage projects should be kept for 3 years by the contractor or subcontractor, and must be open for reasonable inspection to the IDOL.

5) *SUBMIT CERTIFIED PAYROLLS TO PUBLIC BODY*

The Act now requires any contractor or subcontractor working on a prevailing wage project to submit a *certified payroll* to the public body in charge of the project on a monthly basis. The certified payroll records must include for every worker employed on the public works project the name, address, telephone number, social security number, job classification, hourly wages paid in each pay period, and the number of prevailing wage hours worked each day. Such payroll records are public records for at least 3 years, and are subject to disclosure under the Freedom of Information Act. On a related note, all records concerning prevailing wage projects should be kept for 3 years by the contractor or subcontractor, and must be open for reasonable inspection to the IDOL.

6) *ESTABLISH DRUG/ALCOHOL ABUSE PREVENTION & TESTING PROGRAMS*

On October 5, 2007, Governor Rod Blagojevich approved the Substance Abuse Prevention on Public Works Project Act, effective January 1, 2008. Under the Act, employees of contractors are prohibited from using, possessing, distributing, delivering or being under the influence of drugs or alcohol while on public works projects. For purposes of the Act, "under the influence" of alcohol means a blood/alcohol concentration of .02 or higher. Additionally, contractors awarded public works contracts

must at their own expense develop substance abuse prevention programs for their employees.

The Act applies to all employers affected by the Illinois Prevailing Wage Act. As such, all laborers, mechanics, or other workers employed by a contractor on a public works contract are covered. Public works is liberally defined, and encompasses most work performed on public land and/or for a public body (i.e. State of Illinois, local school district, local park district, etc...). However, the Act does not apply if the contractor is a party to a valid union contract that establishes a drug/alcohol testing and prevention program.

Employers must submit a written substance abuse program to the contracting agency before beginning the project. The basic requirements of the programs are as follows:

1. Establishing a minimum of a 9-panel urine drug test, as well as test for alcohol, with blood tests only applicable to post-accident testing
2. Prohibiting employees from using, possessing, distributing, delivering or working under the influence of drugs or alcohol
3. Requiring employees to submit to pre-hire, random, reasonable suspicion, and post-accident drug and alcohol testing and
4. Creating a procedure for notifying employees who have failed a test or refused to submit to testing to cease working until a clean test is obtained.

Employers with a reasonable suspicion that someone is violating the policy for actual use can order the employee to submit to testing or cease working until a test is taken and passed. The employee is to be placed on inactive status until notice of the test results are received. If the employee fails the test, he or she shall face termination; if the test is passed, the employee can return to work and must be paid for any lost time or overtime due to the absence, as applicable.

Employers are generally required to pay for the testing and are solely responsible for the development of a substance abuse program. Any employee who refuses to submit to testing must be removed from work and may only return if a clean test result is obtained.

Interestingly, an officer or employee of the public body can order any worker he/she reasonably suspects to be using drugs or alcohol to leave the project and submit to testing.

So, what should you do now to comply with this new law?

1. Companies must have a commitment to the effort. Without commitment, a business is fooling itself. The company must be focused on creating and sustaining a safe and productive work environment.

2. A realistic and legally defensible drug-free workplace policy must be initiated. This means having a policy in writing that dictates what is and is not allowed and how violations or incidents will be dealt with.
3. Supervisor/Management training is essential to instituting an aggressive effective drug-free workplace. This means that “management” must be regularly trained in their responsibilities, the meaning and application of the policy, identification of indicators (physiological, psychological, and most importantly sociological), and drug and drug paraphernalia identification.
4. The workforce must be educated as to the nature and meaning of the policy. Workers must be aware that the purpose of the program is to create and maintain an environment that is efficient, profitable and safe to work in. The workforce must also be trained as to sanctions, treatment options and any potential return-to-work options.
5. Policy and program should be periodically reviewed.
6. Consistent training and application of the policy guidelines are an absolute must. This provides for regular adjustments as statutes and court decisions evolve.

Key Requirements of the IPWA (Applicable to Public Bodies):

1) ASCERTAIN PREVAILING WAGES

The public body awarding any contract for public work or otherwise undertaking any public works, shall ascertain the general prevailing rate of hourly wages in the locality in which the work is to be performed, for each craft or type of worker or mechanic needed to execute the contract. If the public body desires that the Illinois Department of Labor ascertain the prevailing rate of wages, it shall notify the Illinois Department of Labor to ascertain the general prevailing rate of hourly wages for work under contract, or for work performed by a public body without letting a contract as required in the locality in which the work is to be performed, for each craft or type of worker or mechanic needed to execute the contract or project or work to be performed. Upon such notification the Illinois Department of Labor shall ascertain such general prevailing rate of wages, and certify the prevailing wage to such public body.

For additional detail and analysis of the public bodies obligation and ability to ascertain prevailing wage, see [Determining the Prevailing Wage Rate under the IPWA](#) (below).

2) MANDATE CONTRACTOR'S OBLIGATIONS IN CONTRACTS & BIDS

The public body awarding the contract shall cause to be inserted in the project specifications and the contract a stipulation to the effect that not less than the prevailing rate of wages as found by the public body or Illinois Department of Labor or determined by the court on review shall be paid to all laborers, workers and mechanics performing work under the contract.

The public body shall also require in all contractors' bonds that the contractor include provisions that will guarantee the faithful performance of such prevailing wage clause as provided by contract. All bid specifications shall list the specified rates to all laborers, workers and mechanics in the locality for each craft or type of worker or mechanic needed to execute the contract.

3) NOTIFY CONTRACTORS OF REVISED RATES

Also, if the Illinois Department of Labor revises the prevailing rate of hourly wages to be paid by the public body, the revised rate shall apply to such contract, and the public body shall be responsible to notify the contractor and each subcontractor, of the revised rate.

4) PRESERVE PAYROLL RECORDS SUBMITTED BY CONTRACTORS

All records required to be submitted to the public body by the contractor must be preserved by the public body for up to 3 years.

NOTE: In *Brandt Construction Co. v. Ludwig*, 376 Ill. App. 3d 94 (3rd Dist. 2007) the Appellate Court: 1) affirmed the circuit court's finding that plaintiff did not receive "notice" of the revised rate as prescribed by the Act; 2) affirmed the judgment of the circuit court granting summary judgment to plaintiff on the issue of whether it owes any penalties, interest or liquidated damages; 3) found that cities' failure to give plaintiff notice of the revised rate does not relieve plaintiff of its responsibility for all wages resulting from the increased rate; and 4) remanded the matter to the circuit court to determine the amount of unpaid wages plaintiff owes after applying the revised increased rate.

Classifications of Workers Under the IPWA:

The most general yet fundamental rule under the IPWA is that not less than the general prevailing rate of hourly wages *for work of a similar character* on public works in the locality in which the work is performed, and not less than the general prevailing rate of hourly wages for legal holiday and overtime work, shall be paid to all laborers, workers and mechanics employed by or on behalf of any public body engaged in the construction of public works. The IDOL will look to the workers' skills, knowledge, training and abilities to determine a worker's proper wage classification. *See Illinois Landscape Contractors Association v. IDOL*, 372 Ill. App. 3d 912, 866 N.E.2d 592 (2nd Dist. 2007)

(rejecting the assertion that landscapers should have a different wage classification than laborers for IPWA purposes).

Determining the Prevailing Wage Rate Under the IPWA:

Each public body shall, during the month of June of each calendar year, investigate and ascertain the prevailing rate of wages as defined in this Act and publicly post or keep available for inspection by any interested party in the main office of such public body its determination of such prevailing rate of wage and shall promptly file, no later than July 15 of each year, a certified copy thereof in the office of the Secretary of State at Springfield and the office of the Illinois Department of Labor.

The Department of Labor shall during the month of June of each calendar year, investigate and ascertain the prevailing rate of wages for each county in the State.

If a public body does not investigate and ascertain the prevailing rate of wages during the month of June as required by the previous paragraph, then the prevailing rate of wages for that public body shall be the rate as determined by the Department for the county in which such public body is located.

The public body *except for the Department of Transportation with respect to highway contracts* shall within 30 days after filing with the Secretary of State, or the Department of Labor publish in a newspaper of general circulation within the area that the determination is effective, a notice of its determination and shall promptly mail a copy of its determination to any employer, and to any association of employers and to any person or association of employees who have filed their names and addresses, requesting copies of any determination stating the particular rates and the particular class of workers whose wages will be affected by such rates

At any time within 30 days after the Department of Labor has published on its official web site a prevailing wage schedule, any person affected thereby may object in writing to the determination or such part thereof as they may deem objectionable by filing a written notice with the public body or Department of Labor, whichever has made such determination, stating the specified grounds of the objection. It shall thereafter be the duty of the public body or Department of Labor to set a date for a hearing on the objection after giving written notice to the objectors at least 10 days before the date of the hearing and said notice shall state the time and place of such hearing. Such hearing by a public body shall be held within 45 days after the objection is filed, and shall not be postponed or reset for a later date except upon the consent, in writing, of all the objectors and the public body. If such hearing is not held by the public body within the time herein specified, the Department of Labor may, upon request of the objectors, conduct the hearing on behalf of the public body.

The public body or Department of Labor, whichever has made such determination, is authorized in its discretion to hear each written objection filed separately or consolidate for hearing any one or more written objections filed with them. At such hearing the

public body or Department of Labor shall introduce in evidence the investigation it instituted which formed the basis of its determination, and the public body or Department of Labor, or any interested objectors may thereafter introduce such evidence as is material to the issue. Thereafter, the public body or Department of Labor, must rule upon the written objection and make such final determination as it believes the evidence warrants, and promptly file a certified copy of its final determination with such public body and the Secretary of State, and serve a copy by personal service or registered mail on all parties to the proceedings.

NOTE: Although the local public body may ascertain the prevailing wage rates, it cannot make determinations that are against the manifest weight of evidence. See *Frye v. County of Iroquois*, 140 Ill. App. 3d 749, 489 N.E.2d 406 (3rd Dist. 1986) (county's ascertainment of prevailing wage was against the manifest weight of evidence since the introduction of 19 responses out of 90 questionnaires would not support finding that the wage rates turned in constituted the "prevailing" wage in any meaningful sense).

NOTE: The doctrine of "home rule" does not preempt a local public body's obligations under the IPWA. See *Bernardi v. City of Highland Park*, 121 Ill.2d 1, 520 N.E.2d 316 (1988).

NOTE: Unlike the U.S. DOL with regard to Davis-Bacon, the IPWA (and the IDOL for that matter) shall only look to wage data concerning public works. In other words, public bodies shall not include the payroll data for work performed on private sector/non-prevailing job sites in the determination of "prevailing wage" under the IPWA. See *Illinois Landscape Contractors Association v. IDOL*, 372 Ill. App. 3d 912, 866 N.E.2d 592 (2nd Dist. 2007).

Penalties, Fines, Debarment, Liabilities Pursuant to the IPWA:

With regard to the failure to pay prevailing wages, FIRST TIME VIOLATORS must pay workers the difference between the actual wage paid and the prevailing wage, and are subject to 20% penalties and punitive damages in the amount of 2% of the amount of any such penalty (note: 2% interest accrues on the 20% penalty, and not on the back pay) to the Illinois Department of Labor (IDOL) for underpayments for each month following the date which such underpayments remain unpaid. Additionally, new amendments to the Act dramatically increase the penalties for a SECOND AND SUBSEQUENT VIOLATION of the law. In addition to back pay for any underpayment, a second and subsequent violation of the law will result in a contractor or subcontractor to be liable to the IDOL for an amount equal to 50% of the back pay underpayment (rather than 20%) and also liable to the worker for punitive damages in the amount of 5% (rather than 2%) of the amount of the penalty to the IDOL for each month following the date in which the underpayment remains unpaid.

A violation occurs when: (1) payroll and time records are not kept, (2) records are not provided or access is denied; (3) proper notice of prevailing wage requirements is not made; (4) proper prevailing wage postings are not established; or (5) less than the

prevailing wages are paid. A contractor or subcontractor found to have violated the Act on two occasions in any five (5) year period may now be *barred* from public works projects for four (4) years. Only when one is facing possible debarment does the law allow for a formal administrative hearing to allow the contractor or subcontractor to state its case as to why debarment should not occur (i.e. negligent minor violations --- paid prevailing wages but miscalculated fringes).

Any contractor or subcontractor who fails to submit a certified payroll or knowingly files a false certified payroll is guilty of a misdemeanor.

A contractor violating provisions protecting whistle-blowers will be liable to the IDOL for a penalty of \$5,000 for each violation.

Finally, one of the more strong-armed tactics that the IDOL has at its disposal is to enforce the Act not only against the involved company, but also go after individual officers, directors and owners of the company since individual liability is allowed regardless of how the company is organized (*in other words, being incorporated does not shield individual owners or officers from liability under the Act*).

Violating the Illinois Prevailing Wage Act Can Result In...:

Injunctive Relief...

The Illinois Department of Labor represented by the Attorney General is empowered to sue for injunctive relief against the awarding of any contract or the continuation of work under any contract for public works at a time when the prevailing wage prerequisites have not been met.

Voiding of Public Contract...

Any contract for public works awarded at a time when the prevailing wage prerequisites had not been met shall be void as against public policy and the contractor is prohibited from recovering any damages for the voiding of the contract or pursuant to the terms of the contract. The contractor is limited to a claim for amounts actually paid for labor and materials supplied to the public body.

Private Right of Action...

Any laborer, worker or mechanic employed by the contractor or by any sub-contractor under him who is paid for his services in a sum less than the stipulated rates for work done under such contract, shall have a right of private action for whatever difference there may be between the amount so paid, and the rates provided by the contract together with costs and such reasonable attorney's fees as shall be allowed by the court. However, Illinois courts have declared that the IPWA does not provide an aggrieved worker the right to a Jury Trial. *See Seaman v. Thompson Electronics Co., 325 Ill. App. 3d 560, 758 N.E.3d 454 (3rd Dist. 2001).*

Penalties to the IDOL and Interest to the Worker...

Such contractor or subcontractor shall also be liable to the Illinois Department of Labor for 20% of such underpayments and shall be additionally liable to the laborer, worker or mechanic for punitive damages in the amount of 2% of the amount of any such penalty to the State for underpayments for each month following the date of payment during which such underpayments remain unpaid. Where a second or subsequent action to recover underpayments is brought against a contractor or subcontractor and the contractor or subcontractor is found liable for underpayments to any laborer, worker, or mechanic, the contractor or subcontractor shall also be liable to the Illinois Department of Labor for 50% of the underpayments payable as a result of the second or subsequent action, and shall be additionally liable for 5% of the amount of any such penalty to the State for underpayments for each month following the date of payment during which the underpayments remain unpaid.

Criminal Charges...

Any officer, agent or representative of any public body who willfully violates, or omits to comply with, any of the provisions of the IPWA, and any contractor or subcontractor, or agent or representative thereof, doing public work as aforesaid, who neglects to keep, or cause to be kept, an accurate record of the names, occupation and actual wages paid to each laborer, worker and mechanic employed by him, in connection with the public work or who refuses to allow access to same at any reasonable hour to any person authorized to inspect same under this Act, is guilty of a Class A misdemeanor.

Filing a certified payroll that he or she knows to be false is a Class B misdemeanor. A general contractor is not prohibited from relying on the certification of a lower tier subcontractor, provided the general contractor does not knowingly rely upon a subcontractor's false certification. Any contractor or subcontractor subject to the IPWA who fails to submit a certified payroll or knowingly files a false certified payroll is in violation of this Act and guilty of a Class B misdemeanor.

Debarment...

Debarment is automatic after the contractor or subcontractor has received notice of a second violation of the Act within five years from the date of the notice of first violation, unless within 10 working days after receipt of the notice of a second violation he/she requests an administrative hearing in writing

After receipt of a complaint or on the Department's initiative, the Director shall review the investigative file to determine whether there has been a violation or violations of which the contractor or subcontractor must be given notice. All information and observations made during an audit, investigation or survey shall be considered and shall constitute the basis for the Department's decision that the Act has been violated and that a

notice of violation shall be issued. The notice of violation shall identify the specific violations of the Act.

In making a decision that a contractor or subcontractor has failed to allow the Director access to accurate payroll records, the Director shall rely on the information contained in the investigative file, the certified payroll records filed with the public body in charge of the project or any other information and shall assess a separate violation for each day worked by each worker on the subject project. Each decision of a separate violation under Section 5 of the Act shall be listed in the notice of violation.

In deciding that the Act has been violated and that the issuance of a notice of violation is required, the Director shall base the decision on one or any combination of the following reasons (as per the Illinois Administrative Labor Code):

- 1) The severity of the violations. The Director will consider the following:
 - A) The amount of wages that are determined to be underpaid pursuant to the Act.
 - B) The activity or conduct complained of violates the requirements of the statute and was not merely a technical, non-substantive error. Examples of a technical error include, but are not limited to, a mathematical error, bookkeeping error, transposition of numbers, or computer or programming error.
- 2) The nature and duration of the present violations as well as prior history of the contractor or the subcontractor related to the Act. The prior history considered cannot exceed seven years before the date of the second notice of violation.
- 3) Whether the contractor or subcontractor filed certified payroll records with the public body in charge of the project; whether the contractor or subcontractor has kept the payroll records and accurate records for 3 years; whether the contractor or subcontractor produced certified payroll records in accordance with Section 5 of the Act.
- 4) Whether the contractor or subcontractor has violated any other provision of the Act.

Enforcement of the Illinois Prevailing Wage Act:

It is the Illinois Department of Labor (“IDOL”) that is empowered to enforce and administer the Illinois Prevailing Wage Act. The IDOL is currently headed by Ms. Catherine Shannon.

The IDOL has a “division” that it refers to fittingly as the PREVAILING WAGE DIVISION. Within this division, one will find investigators, mediators and conciliators assigned to primarily administer and enforce the Illinois Prevailing Wage Act. Currently, the head of this division is Mr. Tom Whalen.

Most often the IDOL’s Prevailing Wage Division will send out a “records request” to a contractor that it believes may be in violation of the Act. Typically when records are not provided, a subpoena usually follows. Failure to respond to a valid subpoena could result in a violation, as well as, contempt findings.

Although the IDOL has its own group of attorneys, the Illinois Attorney General’s office will usually represent the IDOL in actual litigation. However, there is the ability for an employee (or group of employees) to sue their employer for prevailing wage violations in the form of a private lawsuit.

For more information about the IDOL, as well as the prevailing wage law, please visit its website at <http://www.state.il.us/agency/idol/>.

Also, note that with directly State funded projects falling under the IPWA, the State may withhold funding. In 2003, State Comptroller Daniel W. Hynes did just that when he suspended the payment of \$2 million to a Contractor pending the IDOL’s investigation into whether the IPWA, if applicable, is being followed by contractors.

Also... WATCH OUT FOR THE SAME IDOL INVESTIGATORS & ENFORCEMENT OFFICIALS LOOKING INTO THE SUBCONTRACTOR RELATIONSHIP VIA THE NEW ILLINOIS EMPLOYEE CLASSIFICATION ACT (whereby the use of independent contractors that are deemed “employees” will cost contractors severe financial exposure!)

Some Quick Do’s & Don’ts in Light of an Illinois Department of Labor Audit/Investigation:

1. All employers should have a thoroughly thought-out action plan in place before an Illinois Department of Labor investigator calls upon a company for an audit. Inspections/audits can be conducted without advance warning or notice. Therefore, advance planning is essential when dealing with DOL enforcement action. The best planning technique involves the training of managerial and supervisory personnel on how to properly interact with a DOL investigator during an investigation.

2. 80% to 90% of the investigations are triggered by “interested” 3rd parties (non-employees). Despite this 3rd party “pressure”, the DOL does have some degree of discretion in modifying amounts due if violations are found. Furthermore, a meeting with supervisory staff at the DOL may also yield some compromise.
3. Beyond Administrative Proceedings (particularly debarment proceedings), the Illinois DOL must go through the Illinois Attorney General’s Office to file a lawsuit against a contractor under the Illinois Prevailing Wage Act. Most often the Illinois Attorney General’s Office will attempt additional compromise prior to filing formal legal action.
4. IDOL Credentials.
 - a. All DOL investigators carry with them Department of Labor credentials bearing his or her photograph and a serial number. The information on these credentials can be verified through the nearest DOL Office. Ask to see the investigator’s credentials and verify that the investigator is with the DOL.
5. Attempt to Postpone any On-sight Inspections.
 - a. Tell the investigator that you are trying to cooperate but you have a company policy which requires you to call your company attorney and not allow anyone onto company property. Tell the investigator the company attorney will contact him/her within a day.
 - b. Have your attorney contact the investigator to see what documents the investigator is looking for.
 - c. A majority of the time, the company and the attorney can put the documents together and send them to the investigator. This keeps the investigator physically out of the company and also gives the company time to meet with its attorney and arrange for a separate meeting or to simply hand over the documents after the attorney has had a chance to review the documents.
6. Do not sign any papers or documents that the investigator may present to you. Also, do not make any statement about the investigation without the approval of your attorney.

Interested Third Parties & the Freedom of Information Act:

FOIA (under Illinois law --- 5 ILCS 140/1 et. seq.):

The purpose of the FOIA is to open governmental records to the light of public scrutiny. Thus, under the FOIA, a presumption exists that public records be open and accessible.

The legislative intent is set forth in section 1 of the FOIA, which provides, in pertinent part, as follows:

“Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act. Such access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest.” *See 5 ILCS 140/1.*

Based upon the legislature's clearly stated public policy and intent, the Illinois supreme court has held that “the FOIA is to be accorded ‘liberal construction.’” *See Southern Illinoisan, 218 Ill.2d 390, 844 N.E.2d 1 (2006).* Accordingly, “[e]ach public body shall make available to any person for inspection or copying all public records, except as otherwise provided in [s]ection 7 of this Act.” *See Southern Illinoisan, 218 Ill.2d 390, 844 N.E.2d 1 (2006).* *See also 5 ILCS 140/3(a).*

When a public body receives a request for information, it must comply (unless one of the narrow statutory exceptions applies). *See Southern Illinoisan, 218 Ill.2d 390, 844 N.E.2d 1 (2006).*

However, not everything is subject to public disclosure. For example, Section 7 of the Illinois FOIA provides, in pertinent part, as follows:

“(1) The following shall be exempt from inspection and copying:

* * *

(b) Information that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information. *The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy.* Information exempted under this subsection (b) shall include but is not limited to:

* * *

(ii) personnel files and personal information maintained with respect to employees, appointees or elected officials of any public body[,] or applicants for those positions[.]” (Emphasis added.) 5 ILCS 140/7 (1)(b)(ii).

If the public body seeks to invoke one of section 7's exemptions, it must give written notice setting forth the particular exemption claimed to authorize the denial. Then, the party seeking disclosure of information under the FOIA can challenge the public body's denial at the trial level. The burden of proof at the trial level is on the public body to establish that the requested documents are exempt from disclosure. *See Reppert v. Southern Illinois University, 375 Ill.App.3d 502, 874 N.E.2d 905 (4th Dist. 2007).*

In addition, section 8 of the Illinois FOIA provides as follows:

“If any public record that is exempt from disclosure under [s]ection 7 of this Act contains any material which is not exempt, the public body shall delete the information which is exempt and make the remaining information available for inspection and copying.” *See 5 ILCS 140/8.*

Remember... per 820 ILCS 130/5 records submitted to a public body shall be considered public records *except an employee's address, telephone number, and social security number* - such information is thereby excluded and shall not be made available to any third party under any circumstances.

Contract Clauses & Notice Requirements under Illinois' PW Law:

In Illinois, a general contractor need only provide written notice to its contracting subcontractors that the IPWA is applicable and must be complied with. In fact, Illinois courts have ruled that general contractors are NOT responsible for violations of the IPWA by their subcontractors since it is the entity engaging the particular worker at issue who is responsible under the Act. *See Cement Masons Pension Fund, et. al. v. William A. Randolph, Inc., 358 Ill. App. 3d 638, 832 N.E.2d 228 (1st Dist. 2005).*

Often times the subcontractor or the contractor doing business directly with the public body is not provided notice that the IPWA is applicable to a certain project. Or, when they are informed initially of certain rates, they aren't put on notice that rates may have changed during the course of the project. In fact, recently an Illinois court held that since the public body failed to provide the contractor notice that the prevailing wages changed during the course of the project, the contractor should not be burdened with penalties, interest or be issued a formal violation when it failed to pay the difference in the rates originally contracted for and the revised rates. *See Brandt Construction Co. v. IDOL, 376 Ill. App. 3d 94, --- N.E.2d --- (3rd Dist. 2007).*

ALSO, REMEMBER THE ILLINOIS EMPLOYEE CLASSIFICATION ACT IS WAITING FOR YOU!!!!!!

Recordkeeping Requirements of the Contractor under the IL PWA:

Contractors must make and keep for a period of no less than 3 years, records of all laborers, mechanics, and other workers employed by them on the project; the records shall include each worker's name, address, telephone number when available, social security number, classification or classifications, the hourly wages paid in each pay period, the number of hours worked each day, and the starting and ending times of work each day. On a related note, all records concerning prevailing wage projects should be kept for 3 years by the contractor or subcontractor, and must be open for reasonable inspection to the IDOL.

The Act now requires any contractor or subcontractor working on a prevailing wage project to submit a *certified payroll* to the public body in charge of the project on a monthly basis. The certified payroll records must include for every worker employed on the public works project the name, address, telephone number, social security number, job classification, hourly wages paid in each pay period, and the number of prevailing wage hours worked each day. Such payroll records are public records for at least 3 years, and are subject to disclosure under the Freedom of Information Act. **Remember... per 820 ILCS 130/5 records submitted to a public body shall be considered public records *except an employee's address, telephone number, and social security number - such information is thereby excluded and shall not be made available to any third party under any circumstances.***

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