Department of Legislative Services

Maryland General Assembly
2022 Session

FISCAL AND POLICY NOTE
Enrolled - Revised

House Bill 145 (Delegate Crosby, *et al.*)
Economic Matters Finance

State Finance and Procurement - Prevailing Wage - Stop Work Orders

This bill authorizes the Commissioner of Labor and Industry in the Maryland Department of Labor (MDL), after an investigation, to issue a stop work order to a public works contractor or subcontractor that may have violated the State's prevailing wage law. The bill also requires the commissioner to promptly conduct an investigation of compliance with prevailing wage requirements if the commissioner receives a complaint of a violation or is otherwise made aware of a possible violation. The commissioner may impose penalties and/or civil fines for specified violations. The bill establishes procedures and timelines for submitting an appeal to the commissioner, hearing the appeal, and issuing a decision.

Fiscal Summary

State Effect: Imposition of stop work orders has the potential to disrupt and even derail public works and infrastructure projects, likely increasing the costs of those projects. A reliable estimate is not feasible as it depends on the duration of the stop work orders, the effects on project completion timelines, and the potential for contract or project cancellations resulting from the orders. MDL may require additional staff to implement the bill's requirements, but a reliable estimate is not feasible, as discussed below. General fund expenditures for MDL may increase further, and reimbursable revenue for the Office of Administrative Hearings (OAH) may increase commensurately, as discussed below. The bill's penalty provisions are not expected to materially affect State revenues.

Local Effect: Imposition of stop work orders on local projects has the potential to have the same disruptive effects as on State projects, as discussed above.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: A contractor or subcontractor subject to an investigation must allow the commissioner to observe work being performed, interview employees, and review books and records *only during normal working hours*.

If the commissioner makes an initial determination that a contractor or subcontractor may have violated the prevailing wage law, the commissioner may issue a stop work order at every site where the violation occurred. The commissioner may issue the order even if the violation has been referred to the Attorney General or another appropriate authority for investigation or prosecution. The commissioner must also (1) notify the contractor or subcontractor of the violation; (2) meet with the contractor or subcontractor within 48 hours of issuing the stop work order; and (3) provide the contractor or subcontractor a reasonable timeframe to resolve the violation.

If a stop work order is issued against a subcontractor, the prime contractor may not terminate the subcontract until 48 hours after the meeting between the commissioner and the subcontractor or if the violation has been resolved. The prime contractor may not incur any civil liability for damages to (1) the subcontractor whose contract is terminated; (2) other subcontractors affected by the termination; or (3) any public body.

The commissioner must issue an order releasing the stop work order if the contractor or subcontractor demonstrates (1) that employees are being paid the appropriate prevailing wage required by State law and (2) that the contractor or subcontractor has paid all penalties assessed by the State. The order releasing the stop work order may include a requirement that the contractor or subcontractor submit periodic reports to the commissioner demonstrating compliance.

If an investigation by the commissioner reveals a violation of the prevailing wage law and the commissioner elects not to issue a stop work order, the commissioner must follow existing procedures in current law to address the violation.

Appeals and Penalties

Within 72 hours of receiving a stop work order, a contractor or subcontractor may submit a written appeal to the commissioner. If an appeal is not filed within 72 hours, the stop work order becomes final. The commissioner must hold a hearing within seven days after receiving the appeal. If a hearing is not held in that time, the contractor or subcontractor may ask an administrative law judge to release the stop work order. The commissioner must issue a written decision on the appeal within five days of hearing the appeal.

The commissioner may impose a penalty of up to $5,000 for each day that a contractor or subcontractor violates a stop work order. In addition to any other penalty, the commissioner may impose a civil fine of up to $1,000 against a contractor or subcontractor that knowingly fails to produce records or attend a hearing or deposition required by the investigation. Each day that a violation occurs is a separate offense.

Current Law: For an overview of the State's prevailing wage law, see the **Appendix – Maryland's Prevailing Wage Law**.

State Fiscal Effect: The commissioner advises that the discretionary use of stop work orders is neither practical nor useful given existing enforcement and penalty provisions. Current law authorizes agencies to withhold progress payments from contractors found to be in violation of the prevailing wage law, and the commissioner advises that this enforcement mechanism has been very effective in recovering more than $4 million in unpaid wages since fiscal 2018. The assessment of liquidated damages, also authorized under current law, serves as both a deterrent and enforcement mechanism for violations of the prevailing wage law. Despite identifying more than 500 violations of the prevailing wage law since 2018, the commissioner advises that MDL is unlikely to make frequent use of the authority to issue stop work orders because of their disruptive effect on project timelines and the effectiveness of other, less disruptive enforcement mechanisms. Therefore, additional staff are not currently necessary for MDL.

However, to the extent that the commissioner elects in the future to issue a substantial number of stop work orders (potentially as many as 150 per year), additional staff and expenditures may be necessary to manage the adjudication of appeals. It is assumed that mandated hearings to adjudicate appeals are referred to OAH rather than conducted by the commissioner. Therefore, general fund expenditures by MDL increase to refer appeals to OAH, and reimbursable revenues by OAH increase on a per-case basis. A reliable estimate of the number of staff needed or of expenditures for OAH is not feasible because it depends on the number of stop work orders issued and the number of orders appealed by contractors or subcontractors. If the number of appeals is substantial, OAH may require additional administrative law judges to manage the increased volume; it is assumed that any increase in reimbursable revenue from the higher case load covers the cost of additional judges.

Small Business Effect: Small businesses that work as contractors or subcontractors may be subject to stop work orders and cancellation of their contracts if they are found to be in violation of the State's prevailing wage law. Moreover, should a stop work order be issued, *all* business operations at the affected site must cease – even those by subcontractors not in violation. Such subcontractors could be subject to penalties for continuing work at the site.

Additional Information

Prior Introductions: None.

Designated Cross File: SB 1 (Senator Beidle, *et al.*) - Finance.

Information Source(s): Maryland State Board of Contract Appeals; Department of General Services; Maryland Department of Labor; Department of Legislative Services

Fiscal Note History: First Reader - January 19, 2022
fnu2/ljm
Revised - Correction - January 26, 2022
Third Reader - March 25, 2022
Revised - Amendment(s) - March 25, 2022
Revised - Clarification - March 25, 2022
Enrolled - April 6, 2022
Revised - Amendment(s) - April 6, 2022

Analysis by: Michael C. Rubenstein

Direct Inquiries to:
(410) 946-5510
(301) 970-5510

Appendix – Maryland's Prevailing Wage Law

Contractors and subcontractors working on eligible public works projects in Maryland must pay their employees the prevailing wage rate. "Public works" are structures or works, including a bridge, building, ditch, road, alley, waterwork, or sewage disposal plant, that are constructed for public use or benefit or paid for entirely or in part by public money.

Eligible public works projects are:

- those carried out by the State;
- any public work for which at least 25% of the money used for construction is State money; and
- specified projects in tax increment financing districts if the local governing body approves of the application of prevailing wages.

Any public works contract valued at less than $250,000 is not required to pay prevailing wages. The State prevailing wage rate also does not apply to (1) any part of a public works contract funded with federal funds for which the contractor must pay the prevailing wage rate determined by the federal government; (2) specified construction projects carried out by public service companies under order of the Public Service Commission; or (3) local House or Senate initiatives that receive State funds in the capital budget.

Prevailing wages are wages paid to at least 50% of workers in a given locality who perform the same or similar work on projects that resemble the proposed public works project. If fewer than 50% of workers in a job category earn the same wage, the prevailing wage is the rate paid to at least 40% of those workers. If fewer than 40% receive the same wage rate, the prevailing wage is calculated using a weighted average of local pay rates. The State Commissioner of Labor and Industry is responsible for determining prevailing wages for each public works project and job category based on annual surveys of contractors and subcontractors working on both public works and private construction projects.

The commissioner has the authority to enforce contractors' compliance with the prevailing wage law. Contractors found to have violated the prevailing wage law must pay restitution to the employees and liquidated damages to the public body in the amount of $20 a day for each laborer who is paid less than the prevailing wage or $250 per laborer per day if the employer knew or reasonably should have known of the obligation to pay the prevailing wage. If an employer fails to comply with an order by the commissioner to pay restitution, either the commissioner or an employee may sue the employer to recover the difference between the prevailing wage and paid wage. The court may order the employer to pay double or triple damages if it finds that the employer withheld wages or fringe benefits willfully and knowingly or with deliberate ignorance or reckless disregard for the law.

The Governor must include at least $385,000 in the budget each year for the Prevailing Wage Unit within the Maryland Department of Labor (MDL).

The University System of Maryland (USM), Morgan State University (MSU), St. Mary's College of Maryland, and the Maryland Stadium Authority (MSA) are all exempt from the prevailing wage law. However, USM, MSU, and MSA all voluntarily comply with prevailing wage requirements for contracts that exceed the $250,000 threshold.

History of the Prevailing Wage

The federal Davis-Bacon Act, originally enacted in 1931, requires contractors working on federal public works contracts valued at more than $2,000 to pay their employees the prevailing local wage for their labor class, as determined by the U.S. Secretary of Labor. The general intent of the law, and similar state and local laws, is to stabilize local wage rates by preventing unfair bidding practices and wage competition. Thirty-two states and the District of Columbia currently have prevailing wage laws; since 1979, nine states have repealed their prevailing wage laws.

Maryland adopted a prevailing wage law in 1945 (Chapter 999), but it only applied to road projects in Allegany, Garrett, and Washington counties. In 1969, the statute was amended to include State public works contracts of $500,000 or more. There have been periodic changes to the law and the definition of "prevailing wage." In 1983, the law was broadened to include public works projects in which the State funds 50% or more of the total project costs and 75% or more in the case of public schools. Chapter 208 of 2000 reduced the prevailing wage threshold for public schools from 75% to 50% of construction costs, thereby bringing school construction projects in line with prevailing wage requirements for other public works projects. Chapters 281 and 282 of 2014 further lowered the State funding threshold for school construction projects to 25% of total construction costs, thereby requiring the vast majority of public school construction projects in the State to pay the prevailing wage, subject to the $500,000 contract value threshold. Chapters 57 and 58 of 2021 lowered the State funding threshold for all public works projects (including school construction) to 25% of total construction costs and lowered the contract value threshold for payment of prevailing wages to $250,000; however, legislative bond initiatives that receive State funds in the capital budget are exempt from the requirement to pay prevailing wages.

The number of prevailing wage projects has risen dramatically in recent years. MDL advises that, during fiscal 2021, its prevailing wage unit monitored 941 projects, down slightly from 1,091 projects in fiscal 2020, but significantly higher than 496 in fiscal 2014.

To accommodate the increase in projects, the number of prevailing wage investigators increased in fiscal 2016 from three to six; as of January 2022, there are four investigators, with a fifth investigator in the latter stages of recruitment.

Six Maryland jurisdictions – Allegany, Baltimore, Charles, Montgomery, and Prince George's counties and Baltimore City – have local prevailing wage laws requiring public works projects in the jurisdiction to pay prevailing wages. Montgomery County's prevailing wage ordinance does not apply to school construction projects, but beginning in fiscal 2023, the county will pay prevailing wages on all school construction projects, regardless of the level of State or county participation.

Research on the Effects of Prevailing Wage on Contract Costs

The Department of Legislative Services (DLS) has reviewed research on the effect of prevailing wage laws on the cost of public works contracts and has found inconsistent and/or unreliable results. The primary challenge confronted by all prevailing wage researchers is identifying an appropriate "control group" consisting of projects of similar type, timing, and location that do not pay the prevailing wage. In most jurisdictions that require a prevailing wage, all projects of a specified type and size are subject to it, so there is no natural control group. Some researchers have compared project costs in states or localities before and after they adopted prevailing wage requirements, but their findings are clouded by the difference in time, during which construction costs changed and other factors were not consistent. Another deficiency in the research is that it almost always relies on project bid prices (*i.e.*, the anticipated cost prior to the beginning of construction) rather than actual final costs. As most construction projects experience change orders or cost overruns affecting their cost, reliance on bid prices negatively affects the validity of the findings. Therefore, research findings related to the effect of the prevailing wage on project costs are inconsistent and often inconclusive. A similar review of research conducted by MDL (at the time, the Department of Labor, Licensing, and Regulation) for the Task Force to Study the Applicability of the Maryland Prevailing Wage Law also concluded that "data limitations create difficulty for researchers on both sides of the issue."

Local school systems occasionally solicit side-by-side bids with and without prevailing wages to help them decide whether they want to accept the full State match (and, thus, be subject to the prevailing wage) or a lesser State match without being subject to the prevailing wage. Data provided to the Public School Construction Program by Anne Arundel, Carroll, Frederick, Howard, and Washington counties, from 2012 through 2015, shows that the cost differential between bids with and without prevailing wages for 266 individual bids submitted for 26 different school construction and renovation projects averaged 11.7%, with a range from 0% to 49%. As with other research data, these represent bid prices, not actual construction costs. An independent analysis of the Maryland side-by-side bid data concluded that factors other than prevailing wages, including bid timing and the level of competition for the bids, accounted for most of the differences between the prevailing wage and nonprevailing wage bids.

One area of the research in which there is a general consensus, and which is supported by the U.S. Bureau of Labor Statistics, is that labor costs represent between 20% and 30% of construction costs (with materials and site costs making up most of the rest). Therefore, a 10% gap between prevailing wages and market wages could theoretically increase total contract costs by about 2.5%, and a 20% gap in wages could increase total contract costs by about 6%. Given the empirical evidence that prevailing wages tend to be higher than nonprevailing wages and that labor costs are a significant portion of overall project costs, DLS believes that it is reasonable to expect that the prevailing wage requirement adds between 2% and 5% to the cost of a public works project. Given the inconsistency and inconclusiveness of the empirical research, however, actual effects may vary by project, with some projects exhibiting higher cost differences and others experiencing negligible differences.