



THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT
DIVISION OF OCCUPATIONAL SAFETY
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June 27, 2001

Daniel S. Field, Chief
Office of the Attorney General
Fair Labor and Business Practices
200 Portland Street
Boston, Massachusetts 02114

Re: Applicability of the Prevailing Wage Law to Activities Associated With Trucking

Dear Mr. ^{Dan}Field:

This letter responds to your request dated June 8, 2001 for clarification of several issues concerning the applicability of the prevailing wage law, M.G.L. ch. 149, §§ 26 - 27D, to trucking associated with public works projects. That request and this response encompass all of the issues raised in your letters dated June 9, 2000, September 29, 2000, and December 13, 2000.

Before I respond to the issues raised concerning trucking, I want to respond to an ancillary issue raised in your June 8, 2001 letter concerning overlapping craft jurisdictions. Your characterization of the Division of Occupational Safety's responsiveness to your requests in this area as "inaction" (page two of your letter, first full paragraph) was wholly inaccurate. Every question concerning overlapping craft jurisdictions raised in your letter to me dated August 8, 2000 was answered in my response to you dated February 21, 2001. Additionally, the Division of Occupational Safety ("DOS") has answered numerous single-issue letters in response to questions raised by you and by attorneys on your staff during my tenure at DOS.



As we discussed in the weeks following my written response to you on this matter, I encourage your office to channel its enforcement resources toward cases involving non-payment of prevailing wage rates, and away from cases involving the slight differences in pay that exist between prevailing wage occupational classifications in areas of overlapping craft jurisdiction.

In the interest of better government, we must improve communications between our offices, and thereby the efficiency of our efforts, on routine and non-routine prevailing wage matters. I suggest we begin by discussing applicability-related questions, whenever possible, during the initial stages of investigation, rather than during the advanced stages of prosecution. This would create a better forum for bringing DOS's history of determinations together with your office's observations in-the-field and through complaints. I also suggest, once again, that your office begin the discussion of potential cases with my staff and me whenever there is a question about the applicability of the prevailing wage law. As we have discussed, your office can do this without revealing the identity of the parties in the potential case, and we will make our files and whatever information we have available to you.

Set forth below are responses to your specific questions concerning trucking:

1. Q. *What are the proper job classifications for the following workers on asphalt road construction projects to which prevailing wage law applies: a) a worker who operates or drives motorized equipment including a distributor, aggregate spreader, chip spreader, liquid asphalt sprayer, roller, dump truck, tanker or any other motorized equipment customarily used in the asphalt application process; b) a worker who assists in the application of asphalt, or in the preparations for paving but who do not operate machinery?*
 - A. a) The occupational classifications listed on prevailing wage schedules that may apply, among others, to the operators of motorized equipment on paving projects include "Asphalt/Concrete/Crusher Plant - On Site", "Four & Five Axle Equipment Driver", "Generator/Lighting Plant/Heaters", "Jackhammer & Paving Breaker Operator", "Mech. Sweeper Operator (On Const. Sites)", "Other Power Driven Equipment - Class II", "Roller/Spreader/Mulching Machine", "Three Axle Equipment Driver", and "Two-Axle Equipment Driver".
 - b) The occupational classifications listed on prevailing wage schedules that may apply, among others, to workers on paving projects who do not operate motorized equipment include "Asphalt Raker", "Flagger & Signaler", and "Laborer".

These classifications can be found in the Teamsters', Laborers', and Operating Engineers' collective bargaining agreements, copies of which have been provided to your office. The aforementioned occupational classifications have been taken

from those agreements. If you wish to suggest any changes that would assist your office with the monitoring and enforcement of public constructions projects involving the application asphalt, please do so. This offer, as I have expressed to you several times, is always available to you for all of the occupational classifications contained on prevailing wage schedules.

2. Q. *Must a driver who transports only equipment or machinery, that is necessary to the application of asphalt, from the employer's place of business or other location to a work site be paid the prevailing wage rate beginning at the time the driver reports to the employer's place of business or other location, or does the rate apply when the driver arrives at the work site?*
- A. The transportation of equipment or machinery to or from a public works site does not require payment of prevailing wage rates, provided the activity does not include the transportation of gravel or fill (M.G.L. ch. 149, § 27), or the transportation of bituminous, redi-mix, or jersey barriers (policy statement dated June 26, 1993).
3. Q. *Must a driver who transports such equipment, from the work site to the employer's place of business or other location, be paid the prevailing wage rate until the driver returns to the employer's place of business or other location?*
- A. See answer # 2, above.
4. Q. *Must workers doing preparation work away from the work site that is related to the asphalt or ready mix prevailing wage project, such as cutting manhole cover protectors, refueling equipment or cleaning equipment, be paid the prevailing wage rate?*
- A. The activities you refer to as "preparation work" performed away from the public works site are not covered by the prevailing wage law. The language of the statute makes repeated reference to the work site itself by repeatedly using the terms "on" and "upon." Clearly, the expressed purpose of the statute is to cover workers at the work site. As you know, the statute makes one exception for the transportation of gravel and fill over-the-road. The Dengenis policy establishes additional exceptions for the transportation of bituminous concrete, ready-mix concrete, and jersey barriers over-the-road.
5. Q. *Does an employer violate the prevailing wage law by reducing the normal regular rate of pay of a worker for non-prevailing rate work, related to a public construction project, but which work is not subject to prevailing wage, such as travel time to a public construction site, provided that the reduction of the regular rate of pay does not reduce the hourly rate to below the state minimum wage?*

May an employer so reduce a worker's regular hourly pay without notifying the employee in advance?

A. Contractors are not required to pay employees prevailing wage rates for non-prevailing wage work, such as travel time to a public works site, unless employees engage in the transportation of gravel or fill (M.G.L. ch. 149, § 27), or the transportation of bituminous, redi-mix, or jersey barriers (policy statement dated June 26, 1993).

6. Q. *In the Maloney Letter, in response to number 3, you indicated that mechanics who repair inoperable equipment while at a work site need not be paid the prevailing wage. When a mechanic performs such repairs in addition to conducting ordinary equipment maintenance at a work site, and the employer fails to distinguish or keep records concerning the nature of mechanical work performed by a mechanic, does the prevailing wage rate apply to all work performed?*

A. No. The applicability of the prevailing wage law cannot be expanded to include an activity that falls outside the scope of the law because an employer fails to keep proper records. While it may be difficult from an enforcement standpoint to distinguish between hours spent on prevailing wage activities and non-prevailing wage activities when employers do not keep proper records, your office bears the responsibility for determining the number of hours that should be paid at the prevailing wage by performing audits of payroll records and interviewing employers and employees.

7. Q. *Last week, you verbally confirmed that your agency will again abide by the Dengenis Memo policy where ready-mix concrete transportation is concerned. Does the Dengenis policy now accurately represent DOS's position concerning transportation of asphalt, ready-mix concrete and gravel and fill?*

A. The Dengenis policy addresses the applicability of the prevailing wage law to the transportation of asphalt, ready-mix concrete, and jersey barriers for the time drivers spend on-site and over-the-road in connection with a public works project. It does not, however, address the issue of gravel and fill. The Dengenis policy has been in place since June 26, 1993, and DOS has never retreated from its terms at any time since.

8. Q. *You confirmed verbally during our most recent meeting on May 29, 2001, that the prevailing wage law applies to all types of ready-mix concrete work. This would include situations where ready-mix haulers deliver liquid ready-mix concrete to projects other than sidewalk construction, particularly when drivers do not directly apply concrete at the work site, but deposit the liquid concrete into a pump. In re: Wage Determination Appeal, Lakeville Redi-Mix, Inc. and A.*

Grazziano, Inc. (1995). Please express DOS's present policy position concerning the applicability of the prevailing wage law to ready-mix drivers.

A. While the Lakeville decision of February 24, 1995 specifically analyzes the applicability of the prevailing wage law to activities associated with the delivery and installation of ready-mix concrete on sidewalk construction projects, ready-mix drivers have been covered comprehensively on public works projects since the Dengenis policy was issued on June 26, 1993. Where the Dengenis policy provides a very thin analysis of its instructions requiring ready-mix drivers to be paid prevailing wage rates while at the work site and over-the-road, the Lakeville decision provides a clear analysis and justification for the on-site portion of the Dengenis policy, including the unloading and application of ready-mix concrete.

9. Q. *An agreement exists between Teamsters' Locals 379 and 42 and private industry, in which a graduated pay scale is employed for certain ready-mix and other drivers. According to the agreement, newly hired drivers are paid at 70% of the negotiated salary rate. This increases to 80% after six months, 90% after one year, and reaches 100% after eighteen months. This has been described as a "sliding scale" under the collective bargaining agreement.*

Would DOS consider these to be "wages established in certain trades and occupations by collective agreements or understandings in the private construction industry between organized labor and employers?" Mass. Gen. L. c. 149, § 26. Would your office consider this information in issuing prevailing wage rate sheets when setting the wage rates? May an employer who is a signatory to such an agreement, as well as a "project-labor agreement", be subject to the prevailing wage law?

A. To answer the last part of your question first: All contractors that work on public works construction projects are subject to the prevailing wage law, regardless of whether they are signatory to a collective bargaining agreement or a project labor agreement. Being signatory to such agreements may subject contractors to additional requirements that go beyond the requirements of the prevailing wage law.

DOS is in the process of considering the "sliding scale" provisions contained in some of the Teamsters' collective bargaining agreements. Updated copies of all such agreements are now being collected, and a complete set will be forwarded to you. Several important questions need to be addressed by both our offices – because, of course, any changes in this area will impact DOS's administrative work and your office's enforcement work – before a "sliding scale" is included on prevailing wage schedules. The following questions constitute a starting-point for our discussion:

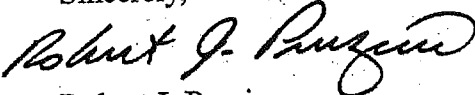
1. DOS uses the lowest, non-probationary wage, commonly known as a journeyperson's wage, when setting prevailing wage rates, allowing, as you know, for bona fide apprentices to be paid in accordance with the apprentice wage provisions contained in collective bargaining agreements. Are the "sliding scale" wage rates properly regarded as non-probationary wage rates?
2. Since the "sliding-scale" wage provisions are based on each employee's length of service with a particular employer, would your office be prepared to factor this component into its investigatory and enforcement work if DOS were to adopt the "sliding scale" provisions.
3. DOS could easily implement the "sliding scale" provisions in Eastern Massachusetts – the territory covered by employer-specific collective bargaining agreements with Teamsters Local 379 – because those agreements each contain the same wage, benefit, and "sliding scale" provisions. How would you suggest DOS implement similar provisions in Central and Western Massachusetts where the various collective bargaining agreements do not contain the same "sliding scale" provisions?

10. Q. *DOS has stated that it is unable to make a determination about whether the prevailing wage law applies to the transportation of gravel and fill because it cannot define the terms "gravel and fill". See enclosed Casassa letter. Does DOS continue to hold the position that it is unable to define the terms "gravel and fill"? Will DOS, therefore, decline to determine that the prevailing wage law applies or issues prevailing wage rate sheets when requested where hauling materials which may be defined as gravel or fill is concerned? Does DOS or "the Administration's" group, convened to further study this issue, continue to exist? If so, when will it issue finding?*

A. At this time, I am unable to share any additional information with you concerning the definitions of the terms "gravel" and "fill" beyond the statements made in the Casassa letter. As for the issuance of prevailing wage schedules, DOS has not and will not refrain from issuing prevailing wage schedules for projects involving the hauling of gravel and/or fill.

If you have any further questions concerning these matters, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, reading "Robert J. Prezioso". The signature is written in a cursive style with a large, looping initial "R".

Robert J. Prezioso
Deputy Director

cc: Angelo Buonopane, Director, DLWD
Kathryn B. Palmer, General Counsel, DOS
Ronald E. Maranian, Program Manager, DOS