

Prevailing Wage Program Opinion Letter May 8, 2013

PW-2013-01-05.08.13

May 8, 2013

Re: Request for Clarification: Prevailing Wage Application to Owner Operators

Dear XXXX:

I write in response to your request for clarification from the Department of Labor Standards (“DLS”) regarding the definition of the term “owner-operator” under Massachusetts Prevailing Wage Law, M.G.L. c. 149 §§26-27. Specifically, you have asked whether an employee who is transferred five percent (5%) ownership interest of a business engaged in a public works project will qualify as an owner-operator under the Prevailing Wage Law and thus be exempt from the requirement that the worker be paid the prevailing wage when working on a public works project.

Analysis

The Prevailing Wage Law applies to the construction of public works by the commonwealth, or by a country, town, authority or district. *G.L. c. 149, §§ 26 and 27*. The term “construction” includes “additions and alternations of public works, including the repair and replacement of public works. *See c. 149, § 27D*. When public awarding authorities contract for construction work, within the meaning of the statute, DLS establishes prevailing wage rates that are not less than the rates that “have been established in certain trades and occupations by collective agreements or understandings in the private construction industry between organized labor and employers.” *c. 149, §26*. These rates apply to all persons engaged in the transportation of gravel or fill to the site of the public work or removing gravel or fill from the site “regardless of whether such persons are employed by a contractor or a subcontractor or or are independent contractors or owner operators.” *c. 149, § 27*. See also *Teamsters Joint Council No. 10 v. Director of the Dept. of Labor and Workforce Development*, 447 Mass. 100 (2006). DLS has interpreted the statutory language in accordance with its plain meaning and, as such, has not, with the exception of the aforementioned gravel or fill work, required owner-operators or independent contractors to pay themselves the prevailing wage for public works projects in which they engage. See, e.g. *DOS Opinion Letter to Collins, Town of Franklin*, March 10, 2000.

DLS has not previously received a request for an opinion on the definition of “owner –operator” within the meaning of the Prevailing Wage Law and welcomes the opportunity to do so now. For the reasons set forth below, it is the determination of this agency that the employee, who has a 5% equity interest in the company, would not qualify as a legitimate “owner-operator” under the Prevailing Wage Law and, thus, would not be exempt from the requirement that he or she be paid the prevailing wage rate for the performance of work on a public works project.

The purpose of the Prevailing Wage Law is to ensure that workers who perform work on public works projects are paid wage rates on par with those under collective bargaining agreements between organized labor and employers in the private construction industry. *See M.G.L. ch. 149 §26; McCarthy’s Case*, 837 N.E.2d 669, 677(Mass. 2005). The legislative intent would be frustrated if employers were permitted to circumvent paying the prevailing wage rate simply because their employees have de minimis ownership interest in the organization. It is the determination of this agency that five percent (5%) ownership interest in a corporation does not negate “employee” status. Going forward, DLS will adopt the federal test, under the Davis Bacon Act to establish a bright line to determine whether an individual qualifies as a legitimate “owner/operator” under the Prevailing Wage Law. Under the Davis-Bacon Act,

an employee who owns at least a bona fide twenty percent (20%) equity interest in the enterprise in which he is employed, regardless of the type of business organization (e.g. corporation, partnership, etc.), and who is actively engaged in its management, is considered a bona fide exempt executive and not subject to the prevailing wage requirements. See 29 CFR §541.101.

I hope this information has been helpful. Please note that this advice is based on the limited information provided with your request. The existence of additional facts not contained in your request might require a different conclusion. If you have any further questions, please feel free to contact me.

Sincerely,
Patricia A. DeAngelis
General Counsel