

Prevailing wage opinion Letter 06-11-08

I am writing in response to your request, on behalf of your client, XXXX, Inc. (XXXX, Inc.), for this Office's written opinion regarding the applicability of the Massachusetts Prevailing Wage Law, G.L. c. 149, §§26-27. Specifically, you have asked if the prevailing wage law applies to work performed by XXXX Technicians (or "Control Technicians") on a public works project.

Your letters of October 26 and December 4, 2007, and an interim response from the MA Attorney General's Office dated November 21, 2007, reference a specific project, namely construction work at the ZZZZ High School. We were not provided with detailed information about tasks specific to this project; however, the issues you raise regarding HVAC commissioning/re-commissioning work, and other work included in the Controls Technicians' job description provided to this Office, are issues applicable to many projects involving HVAC work. This agency will take this opportunity to clarify what work is covered under the state prevailing wage law, using the position description you provided as an example.

The Massachusetts prevailing wage law applies to the construction of public works by the commonwealth, or by a county, town, authority or district. G.L. c. 149, §§26, 27. The term "construction" is defined, in pertinent part, as "additions to and alterations of public works." G.L. c. 149, §27D. When public awarding authorities contract for construction work, within the meaning of the statute, the Division of Occupational Safety (DOS) sets prevailing wage rates for these projects based on "collective agreements or understandings in the private construction industry between organized labor and employers." G.L. c. 149, §26. DOS also looks to these agreements and understandings to determine the appropriate job classifications under the prevailing wage law.

As stated earlier, you have provided DOS with a copy of the job description for XXXX Technicians. (See Attachment A) This agency was previously provided a similar position description for the same job title and job code, in a letter from a[n] XXXX attorney, dated August 9, 2005. However, the two job descriptions list somewhat different "essential functions and responsibilities." At that time, this agency responded, in pertinent part, as follows:

As is the case with most position descriptions, the duties listed vary in both the level of detail and the type of activity. The position description you provided includes duties that are clearly not prevailing wage work such as "provides sales leads to appropriate personnel," or "maintaining files." However, there are other duties listed such as "[r]esponsible for end-to-end testing, downloading programming, starting up, and commissioning on assigned projects" which may include work subject to the prevailing wage law. As is always the case, it is necessary to evaluate the particular tasks performed on a specific work site.

DOS Opinion Letter to Gillespie, dated August 24, 2005. [\[1\]](#)

As was the case earlier, some of those duties listed in the position description provided with your October 26, 2007 letter do not entail prevailing wage work, e.g. maintaining inventory, customer contacts, communications with XXXX account management staff. Additionally, any listed work that is performed off-site, such as training sessions at factory locations and off-site computer work, would not be covered by the prevailing wage law. However, the position description also includes work that would require the payment of prevailing wage.

The job description summary states that the XXXX Technician is "[r]esponsible for the re-commissioning, diagnosis, *repair and modification of environmental-control systems*, utilizing knowledge of electronics, direct digital control, HVAC theory, and control applications" (emphasis added). Clearly, the job summary includes "additions to and alterations" of the HVAC system, which constitute "construction," within the meaning of the statute. Additionally, several of the delineated "essential functions and responsibilities" (EF&R) include such tasks. Examples include: "component part replacements" (EF&R #2), and "on-site repairs" (EF&R #5).

To address the subject of commissioning, or re-commissioning, an overview of what is entailed in such processes may be helpful. As we understand it, after a new system has been installed, or an existing system is replaced in whole or in part, the system must undergo testing, adjusting and balancing (TAB), and commissioning (in the case of a new system) or re-commissioning (in the case of a replacement project). [2] The TAB contractor and the commissioning provider are typically separate entities, but this need not be the case. [3] In simple terms, TAB procedures measure air and water flow to determine appropriate distribution of each; commissioning is the final testing process that verifies proper operation among system components. The important point seems to be that installation or replacement of a system involves much more than simply installing a "system" and cleaning up. Such construction work is incomplete unless the owner has the assurance that the system purchased actually works as designed, and this assurance is provided by both the TAB and commissioning processes. Therefore, this agency will consider installation/replacement, TAB, and re-commissioning and commissioning of an HVAC system to be all part of the same "construction" work within the meaning of the statute.

One additional step is necessary in order to establish rates for this work. As stated earlier, DOS sets prevailing wage rates for these projects based on "collective agreements or understandings in the private construction industry between organized labor and employers." G.L. c. 149, §26. DOS also looks to these agreements and understandings to determine the appropriate job classifications under the prevailing wage law. In this instance, the collective bargaining agreements with the pipefitters' union cover the commissioning of HVAC systems as described. Union pipefitters perform HVAC commissioning on job sites in Massachusetts, and are trained in commissioning processes through their apprentice training program. [4] Therefore, the proper job classification for commissioning work is *Pipefitter* or *HVAC Mechanic*, which are the same pay rate.

I hope this information has been helpful. If you have any further questions, please feel free to contact me.

Sincerely,
Lisa C. Price
Deputy General Counsel

[1] Your letter of December 4, 2007, states that DOS advised XXXX in the letter to Ms. Gillespie, dated August 24, 2005, that agency "opinions can not be issued until a work site inspection has been performed." To clarify, DOS' letter stated that "it is necessary to evaluate the particular tasks performed on a specific work site;" this may or may not involve a physical inspection of the site.

[2] For a helpful overview to HVAC Commissioning see Rebecca Thatcher Ellis, P.E.'s article, "Balancing and Commissioning," TAB Journal, Winter 2003.

[3] Hereafter, we will use the term "commissioning;" however, the analysis is the same for re-commissioning. We see no reason to distinguish the terms for purposes of the prevailing wage law.

[4] Cf. DOS Opinion Letter, dated February 12, 2008, where DOS was provided with no information about contracts where union electricians performed fire alarm commissioning work.