

Prevailing Wage Program Opinion Letter June 30, 2010

RE: Apprentices Requirement of Chapter 30 of the Acts of 2009, Section 33

You have requested that the Division of Occupational Safety ("DOS") provide a written opinion setting forth our interpretation of the apprentice requirement of Section 33 of Chapter 30 of the Acts of 2009, "An Act Mobilizing Economic Recovery in the Commonwealth" (the "Act"). Your request is not based on a specific set of facts. Accordingly, our interpretation of the apprentice requirement and an outline of the approach DOS will take in determining the applicability of the requirement to specific projects is general in nature.

Background

Recently, the legislature enacted Chapter 30 of the Acts of 2009 entitled "An Act Mobilizing Economic Recovery in the Commonwealth" (the "Act"). The stated purpose of the Act is to "infuse the state economy with available federal funds, create jobs and provide economic relief to the people of the Commonwealth of Massachusetts in the present fiscal emergency." One component of the Act prescribes a set of requirements which apply to public works projects funded by the American Recovery and Reinvestment Act of 2009 ("ARRA") where the amount of construction costs under any contract awarded is likely to exceed \$1 million. *See §33(a) of the Act.* The requirements include apprenticeship and hiring preferences for residents. *§§ 33(b) and (e).*

The apprentice requirements, set forth in Section 33(b), apply to public works projects funded, in whole or in part, with ARRA funds, where the amount of construction costs is likely to exceed \$1 million dollars:

(a) Notwithstanding any general or special law to the contrary, the following requirements shall apply to any public works project funded by the American Recovery and Reinvestment Act of 2009 where the amount of construction costs under any contract awarded is likely to exceed \$1,000,000.

Ch. 30 of the Acts of 2009, Section 33(a). For the purposes of the Act, the term "public works" is defined as follows:

building or work the construction of which is carried on by authority of the commonwealth, or by a county, town, authority or district, *or* with funds of a federal agency or the commonwealth or a county, city, town, authority or district to serve the interest of the general public, regardless of whether title thereof is in the commonwealth or in a county, city, town, authority or district; provided, however, that for the purposes of this definition, "construction" shall have the meaning provided in section 27D of chapter 149 of the General Laws. *Ibid. (italics added).*

Statutory Interpretation and Application by DOS

Following the express language in Section 33(a), DOS will employ a two step analysis to determine the applicability of the apprentice requirement to projects funded, in whole or in part, with ARRA funds: (1) is the project a "public works" project within the meaning of the statute; and (2) is the cost of construction of the project expected to exceed \$1 million. If the answer to these two inquiries is "yes", then the apprentice requirement will apply. The analysis set forth

herein further addresses the question of which employees are included for the purposes of calculating the 20% apprentice requirement.

1. Is the Project a "Public Works Project" under the Statute?

The plain language of the statute sets forth two categories of projects which constitute "public works" projects to which the apprenticeship requirement is applicable: "building or work, the construction of which" is *either* (1) carried out "by the authority of the Commonwealth or by a county, town, authority or district" *or* (2) carried out "with funds of a federal agency or the commonwealth" *Section 33(a) (italics added.)*. The statute explicitly provides that "whether title thereof is vested in the commonwealth [or other public entity]" is not relevant to the inquiry of whether a project constitutes a "public work." The only limitation on the broad definition of the term "public works" is that the project at issue "serve the interest of the general public." This language, on its face, applies the apprentice requirements in Section 33 to privately owned projects that are funded through ARRA if the projects "serve the interest of the general public." Whether a project "serves the interest of the general public" will entail a fact specific analysis.

2. Is the Cost of Construction Expected to Exceed \$1 million?

The second inquiry is straightforward. As provided in Section 33(a), contracts which received funding through ARRA for public works projects (as defined above) where the construction [\[1\]](#) costs are likely to exceed \$1 million are subject to the apprentice and other requirements of Section 33 of the Act.

3. Who are "Employees" for the Purposes of the Apprentice Requirement?

Once a project is determined to be a public works project where the amount of construction costs is likely to exceed \$1 million, the project is subject to the provisions of Section 33(b) of the Act which provides, in relevant portion, as follows:

[O]n a per project basis, not less than 20% of the total hours of employees receiving an hourly wage who are directly employed on the site of the project, employed by the contractor or subcontractor and subject to the prevailing wage, shall be performed by apprentices in bona fide apprentice training programs as provided in sections 11H and 11I of chapter 23 of the General Laws which are approved by the division of apprenticeship training in the executive office of labor and workforce development.

In general, this section requires that, on a per project basis, 20% of the total hours of employees receiving an hourly wage shall be performed by apprentices in bona fide apprentice training programs. In order to determine which employee hours must be used for calculating the 20%, section 33(b) sets forth 3 factors. It applies to employees receiving an hourly wage who are:

- *Directly employed on the site of the project*
- *Employed by the contractor or subcontractor, and*
- *Subject to the prevailing wage*

These provisions denote which employees should be used as the denominator in determining how many apprentices are required on a particular job.

The employees to be counted for this purpose are those who are directly employed on the site of the project, employed by the contractor or subcontractor and subject to the prevailing wage [2]. A similar provision contained in Chapter 306 of the Acts of 2004, relative to safety and health on public construction sites applies a requirement for safety and health training for "employees to be employed at the work site." The Office of the Attorney General has issued an advisory interpreting that provision as applying to a certain category of employees, which aides in the interpretation of the apprentice provision:

The first category includes any employee who is entitled to receive the prevailing wage while on the worksite as determined by the Division of Occupational Safety. (citation omitted). The second category includes any other employee of any entity that is required to pay the prevailing wage at the worksite. Generally, supervisors (with the exception of so-called "working foremen") are not entitled to receive the prevailing wage and therefore serve as an example of employees who fall into this second category. ... Examples of individuals who are not Covered Employees are truck drivers and individuals delivering materials provided they are not entitled to the prevailing wage while on the worksite.

An Advisory from the Massachusetts Attorney General's Fair Labor Division on Chapter 306 of the Acts of 2004, An Act Relative to the Health and Safety on Public Construction Projects, 2008/2.

Analogously, the 20% apprentice requirement of Section 33(b) will be interpreted as applying to those employees who are on the worksite, employed by a contractor or subcontractor and who work in job classifications that are covered by the prevailing wage, and would exclude those employees on the worksite whose job classifications would not be covered by the prevailing wage. The Attorney General's Advisory provides examples that are useful in evaluating which employees would fall outside the 20% apprentice requirement, i.e. supervisors, material delivery persons and others to whom the prevailing wage does not apply. To the extent that there are projects which have been specifically exempted from paying workers the prevailing wage, the specific exemption shall not have any bearing on the apprentice requirements contained in the Massachusetts law. For those project, the provision shall be interpreted as distinguishing among workers who would otherwise be covered, but for the exemption from payment of the wages. To determine otherwise would render the operative provisions of Section 33(a) and the first clause of Section 33(b) superfluous. *See e.g. Simon v. State Examiners of Electricians, 395 Mass. 238, 243 (1985) ["W]henver possible, no provision of a legislative enactment should be treated as superfluous."* Simply stated, if the legislature had intended the applicability of the apprenticeship and other requirements to be limited to those projects to which the prevailing wage law applies, the legislature would have stated that in the section of the law that defines applicability of the section.

I hope this information has been helpful. If the Division of Occupational Safety can provide you with further assistance, please do not hesitate to contact us.

Sincerely,
Heather E. Rowe
Acting Commissioner

[1] The term "construction" is given the same meaning as in Section 27D of Chapter 149 of the General Laws of Massachusetts, which provides, in relevant portion:

"'construction' and 'constructed' . . . shall include additions to and alterations of public works, the installation of resilient flooring in, and the painting of, public buildings and public works; certain work done preliminary to the construction of public works, namely, soil explorations, test borings and demolition of structures incidental to site clearance and right of way clearance; and the demolition of any building or other structure ordered by a public authority for the preservation of public health or public safety."

[2] All projects funded through ARRA, with limited specific exemptions under HUD regulations, are subject to the federal prevailing wage, also known as the Davis Bacon Act:

SEC. 1606. Notwithstanding any other provision of law and in a manner consistent with other provisions in this Act, all laborers and mechanics employed by contractors and subcontractors on projects funded directly by or assisted in whole or in part by and through the Federal Government pursuant to this Act shall be paid wages at rates not less than those prevailing on projects of a character similar in the locality as determined by the Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40, United States Code. With respect to the labor standards specified in this section, the Secretary of Labor shall have the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (64 Stat. 1267; 5 U.S.C. App.) and section 3145 of title 40, United States Code.
American Recovery and Reinvestment Act of 2009, Section 1606.