

Prevailing Wage Program Opinion Letter June 25, 2010

Re: Request for Opinion Regarding Permissibility of Deduction under the Massachusetts Prevailing Wage Law

I write in response to your letters, dated February 3, 2010 and May 20, 2010, in which you ask for the written opinion of the Division of Occupational Safety ("DOS") regarding the Massachusetts Prevailing Wage Law, M.G.L. c. 149, § 26 et. seq. Specifically, you seek DOS' opinion as to whether your client may deduct from the prevailing wage rate contributions it makes to a supplemental unemployment plan - the American Contractors Trust and Plan for the States of Massachusetts, Connecticut and Rhode Island (the "Plan"). Contributions are made to the Plan for each hour a particular employee works on a project to which the Massachusetts Prevailing Wage Law applies. The employer deducts the full amount of such contributions from the wages that the employee receives on the prevailing wage project and does not spread the amount deducted per hour overall from the wages received by the employee for work on private projects or those performed in other states. We understand that the employer may deduct as much as \$35 dollars per hour from the prevailing wage rate required to be paid on public works projects.

Our understanding of the Plan is that the contribution by the employer does not vest immediately to the benefit of the employee: Article VI.B of the Plan provides, in part, that "Benefits paid shall consist of Employer contributions plus interest and forfeitures less administrative charges." Article VI.F further provides that "if an Employee terminates due to retirement, death, is terminated by the Employer for cause or the Employee otherwise does not qualify for benefits under the plan upon his or her separation from employment, any contributions and/or entitlement to benefits will be forfeited and reallocated among trust participants..." The Plan contains additional circumstances under which employees may lose contributions made on their behalf to the Plan. Accordingly, contrary to your characterization, the supplemental unemployment benefit does not vest to the benefit of the employee "immediately". For the reasons explained below, the deduction of the contributions to the Plan from the prevailing wage rates, as described above, is not permitted under the Massachusetts Prevailing Wage Law.

Analysis

Under the Massachusetts Prevailing Wage Law, DOS sets prevailing wages for public construction projects. *M.G.L. c. 149, §§ 26 and 27*. DOS is required to include payments by employers to health and welfare plans, pension plans and supplementary unemployment benefit plans under collective bargaining agreements or understandings between organized labor and employers in establishing the prevailing wage rates. *§§ 26 and 27*. The law further provides that "Any employer . . . who does not make payments to a health and welfare plan, a pension plan and a supplementary unemployment benefit plan, where such payments are included in said rates of wages, shall pay the amount of said payments directly to each employee engaged in construction." *§ 27*. Conversely, employers who make contributions to bonafide health and welfare, pension and certain supplemental unemployment plans may, under certain circumstances, deduct contributions to qualifying plans from the hourly prevailing wage rate.

An employer may not deduct more from an employee's prevailing wage than is actually contributed to a bonafide plan on his or her behalf. See e.g. *DOS Letter PW-2003-03-09.08.03* [contributions to hours bank plan for purchase of health benefits permissible deduction under the prevailing wage law]; *DOS Letter PW-2002-04-10.02.02* [employers may calculate an hourly health plan deduction by dividing a monthly health insurance premium by an employee's customary hours of work]. Implicit but not expressed in these opinions is that an employer must annualize contributions to bonafide health and welfare, pension and supplemental unemployment benefit plans so that the amount of the plan

contribution deducted from the hourly prevailing wage rate reflects the total number of hours an employee works for the employer in a plan year. [\[1\]](#) Accordingly, DOS takes this opportunity to confirm that an employer must annualize contributions to qualifying health and welfare, pension and supplemental unemployment plans so that the amount deducted from the prevailing wage rate reflects the total number of hours an employee works for the employer in a plan year.

I hope this information has been helpful to you.

Sincerely,
Patricia A. DeAngelis
Acting Deputy Commissioner

[\[1\]](#) This interpretation is consistent with the U.S. Department of Labor rules with respect to deductions under the Davis Bacon Act for plans which do not provide for immediate vesting. See Prevailing Wage Resource Book 2009