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EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
DEPARTMENT OF LABOR STANDARDS

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The Department of Labor Standards (DLS) was asked to review the correct prevailing wage classification for workers "removing, trimming and shaping roadside growth to re-establish sight distance clearing". This work is often accomplished with tractors, excavators of similar vehicles equipped with attachments to shear, mulch and clear the overgrowth.

DLS has been instructing awarding authorities and prospective bidders that the type of work reference above, not associated with building or repairing a roadway and/ or other construction site work, is subject to M.G.L. c 149, s. 27F not M.G.L. c. 149, s. 27. This instruction, however, seems at odds with the blanket statement appearing in DLS' opinion letter dated March 13, 2014 that "tree trimming and tree removal work may, but does not have to, be part of a broader construction project in order to be prevailing wage; it is, by definition, construction in and of itself and *thus the construction classifications apply.*" DLS agreed to revisit the 2014 opinion letter and invited the public and interested parties to attend a forum to address the discrepancy.

It should be noted at the outset that the "Construction Prevailing Wage Law" M.G.L. c. 149, s. 27 and the "Non-construction Prevailing Wage Law" M.G.L. c. 149, s. 27F covering the operation of "trucks, vehicles and other equipment" engaged in the performance of public work, are mutually exclusive statutes. That is, if section 27 applies, section 27F cannot apply. Thus, given the broad proclamation in the 2014 opinion letter that all tree work is "construction", the contradictory assertion also appearing in the opinion letter that, "certain tree trimming work ...falls under non-construction 27F classifications" needs to be explored.

"Construction" as it applies to the Construction Prevailing Wage Law is statutorily defined at M.G.L. c. 149, s. 27D as an "addition or alterations to a public works" including "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". Webster's Third New International Dictionary of the English Language Unabridged© 1981 defines **Public Works** as, "fixed works (as schools, highways, docks) constructed for public use or enjoyment [especially]when financed and owned by the government..." According to the Massachusetts Appeals Court, "The core concept of 'public works', in Massachusetts and elsewhere, is commonly expressed as

involving the creation of public improvements having a nexus to land, such as a building, road, sewerage or waterworks facility, bridge, or park.” Perlera v. Vining Disposal Service, Inc., 47 Mass. App. Ct. 491 (1999).” The Federal DOL regulation defining “public works” for purposes of the Davis Bacon Act states: “The term public building or public works includes building or work, the construction, prosecution, completion, or repair of which, as defined above, is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency. 29 C.F.R. § 5.2(k).

Overgrown brush, saplings and trees on the side of the highway are not “public works” as they were not constructed for the public’s use or enjoyment. Thus, their trimming and/or removal does not amount to “an alteration or addition to a public works” unless, of course, it is done in conjunction with the construction of the highway or another public works project - as that would then constitute “site clearance” incidental to a public works construction project.

Pursuant to M.G.L. c. 149, s. 27F, public contracts whereby a “truck, vehicle or other equipment” are used to perform public work, to be valid, must contain language requiring that the operators of all such equipment be paid prevailing wages as determined by DLS. In administering this statute, DLS has interpreted that the phrase “other equipment” to means “other *heavy equipment* akin to a truck or a vehicle”. Because there needs to be a defining line, DLS has held that to qualify as an “operator” under M.G.L. c. 149, s. 27F one must be operating a truck, vehicle or other piece of machinery bigger than a lawnmower. For example, section 27F is triggered when one contracts to use a tractor to cut the public grass along the side of a highway. Similarly, contracting to maintain sight-line clearance by mulching the brush, trees and branches along the side of a roadway with an excavator armed with a mulching or shearing attachment, is subject to section 27F.

Traditionally, clearing, cutting, trimming and slashing of brush or trees, by hand or with mechanical cutting methods is the work of a laborer. Thus, when such work involves the operation of a bucket truck, bobcat, hand-fed chipper/ shredder, stump grinder or the like, DLS believes that the proper wage rate classification is “Laborer”. Occasionally, larger specialized equipment may be used to accomplish the same work. For example, excavators may be equipped with special attachments as mentioned above, or bulldozers or frontend loaders may be used. Operators of these larger types of equipment are classified as “Operating Engineers” and their prevailing wage rate will be commensurate to the size of equipment they are operating.

Under the circumstances prompting this inquiry, where such work was anticipated to restore “sight distance clearing”, and was not incidental to construction, awarding authorities should request a non-construction-27F prevailing wage schedule. However, in any circumstance where tree trimming or removal is related to a public works construction project, or constitutes preliminary site clearance incidental to construction, then prevailing wage rates should be sought pursuant to section 27. Although the same categories, “laborers” and “operating engineers”, will apply under both statutes, the law

requires DLS to set the rates differently. As a result, the section 27F rates are lower than the construction-section-27 rates and it would be a violation of the prevailing wage law to use the lower rate for tree trimming incidental to construction of public works.

DLS draws no distinction between the sight clearance maintenance along the side of a highway and the maintenance of vegetation, brush or trees along railroad tracks or power lines. Thus, DLS will no longer be setting a special rate for utility companies and railroads. Routine trimming and maintenance of trees around utilities shall require section 27F rates. Clearance of trees to install utilities or to effectuate repairs, shall require section 27 rates.

DLS had been establishing special rates for utility companies contracting for tree trimming around electrical lines based upon a solitary agreement with a private tree service. Setting aside for now a determination whether that agreement actually provided proof of a negotiated rate between organized labor and management, the contract expired years ago and we have been using the outdated "Tree Trimmer" and "Tree Trimmer Groundman" rates without adjustment for several years. Currently, utility companies and railroads using these rates are paying significantly less for tree trimming around high tension electrical lines than every other public entity pays for similar work under far less dangerous circumstances. Therefore, DLS will be dropping these two classifications from our future prevailing wage schedules and utility companies should use the "Laborer" and "Operating Engineer" rates as set forth above.

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