



## Interpretive Notice & Formal Opinion (“INFO”) #13:

### Prevailing Wage and Apprenticeship Program Requirements for Public Projects

#### Overview

This INFO provides a summary of (A) the right to be paid a “prevailing wage” when working for contractors and subcontractors on certain public projects funded by the State of Colorado, and (B) the requirement for subcontractors in certain trades to participate in a certified apprenticeship program.<sup>1</sup>

#### Prevailing Wage Requirements for Public Projects

Contractors who contract with state government agencies for public projects must provide project employees with wages and benefits that match or exceed the value of wages and benefits prevailing in the marketplace for the employee’s job. They are also required to pay wages weekly to all employees employed directly on the site of work. The prevailing wage rate must be included in the bid solicitation by the agency contracting for the project. Public contracts must require that all wages for project employees match or exceed the prevailing wage for the employee’s job, trade or occupation, and geographic locality.

#### **What Projects and Which Employees Are Covered?**

The new prevailing wage requirement for state projects applies to every contractor who is awarded a contract of \$500,000 or more for a public project by a government agency, as well as their subcontractors. It applies to all employees engaged to work on the project, for their pay received on that project.<sup>2</sup>

Public projects include:

- the construction, repair, improvement, or demolition of any type of “public improvement” such as buildings, roads, or other structures built to enhance public health, safety or welfare,
- contracts for the operations or upkeep of public improvements,<sup>3</sup> and
- any work, construction, or repair performed by a private party through a contract under which the government will rent, lease, or purchase at least fifty percent of the project.

All workers who meet the definition of “employee” in the Colorado Wage Act and who are engaged to work on a public project are subject to the prevailing wage requirement. Contractors should be aware of the need to correctly classify all workers who meet this definition as employees rather than independent contractors. Under the Wage Act, C.R.S. 8-4-101(5):

- An “employee” is any person performing labor or services for the benefit of an employer. In determining whether an individual is an employee, Colorado law considers all relevant evidence about the relationship between the worker and the employer, including the degree of control the employer may or does exercise over the worker, and the degree to which the worker performs the “primary work” of the employer.
- An “employee” does **not** include a person who is:

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<sup>1</sup> These requirements, effective July 1, 2021, arise from the [Colorado Quality Apprenticeship Training Act of 2019](#) (the “Act”), which amended the Construction Bidding for Public Projects Act by adding the apprenticeship program requirements at CRS 24-92-115, and a new section on Prevailing Wage for Public Projects at CRS 24-92-201 *et seq.* For projects that receive federal funding, the federal Davis-Bacon Act, 40 USC 3141 *et. seq.*, and other related federal laws may apply; for more information on these laws, visit the Division’s [Prevailing Wages webpage](#) or [SAM.gov](#).

<sup>2</sup> In covering “other construction workers,” the Act covers more employees than the “mechanics and laborers” covered by the Davis-Bacon Act, 42 USC 3142(1).

<sup>3</sup> This definition of public projects is broader than under the Davis-Bacon Act regulations, 29 CFR 5.9(k). Unlike those regulations, it includes improvements and demolitions; contracts for the operation or upkeep of completed projects; and all “public improvements” (including roads) rather than only buildings and “works.” Public projects undertaken using the “integrated project delivery” model defined at CRS 24-93-103 *et seq.* are also covered. However, projects contracted through the Colorado Department of Transportation are **not** covered by the Act.

- primarily free from control and direction in the performance of the service, both under his or her contract for the performance of service and in fact, and
- customarily engaged in his or her own independent trade, occupation, profession, or business that is related or similar to the service that the worker is providing to the employer.

The following are **not** covered by the Act's prevailing wage requirements:

- two kinds of contracts that federal prevailing wage law covers — contracts for any public project receiving federal funding, and contracts awarded by the Colorado Department of Transportation; and<sup>4</sup>
- contracts for work for political subdivisions of the state, such as cities, counties, school districts, and special districts, because they are not agencies of the state government.

### How are Prevailing Wages Calculated?

Under the Act, “wages” include more than just hourly rates of pay, and also include many other components of compensation, to ensure that the overall value of employees’ compensation matches or exceeds that prevailing in the marketplace. Specifically, the statute provides that “wages” include “the basic hourly rate of pay” **plus** the value of all of the following benefits and components of compensation:<sup>5</sup>

- “medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing,”
- “unemployment benefits, life insurance, disability and sickness insurance, or accident insurance,”
- “vacation and holiday pay,”
- “defraying the costs of apprenticeship or other similar programs,” and
- “other bona fide fringe benefits.”

However, benefits or components of compensation that an employer is required to provide by law (such as for workers’ compensation or unemployment insurance) are **not** included in the prevailing wage calculation.<sup>6</sup> The prevailing wage calculation is performed by the Department of Personnel and Administration (DPA).

The Act requires that the values of the listed benefits are calculated by adding together the value of (1) irrevocable contributions made by the employer to the benefits fund, plan or program, and (2) the reasonably anticipated cost to provide the benefit to the employee.

The value of apprenticeship program costs is determined differently than other benefits: Contractors may pay the apprenticeship program portion of the prevailing wage by making payments required by a collective bargaining agreement (CBA) or by the terms of an apprenticeship program sponsored by a multi-employer trade association. If the contractor is not part of an apprenticeship program under a CBA or through a trade association, it must instead pay the prevailing apprenticeship contribution amount directly to workers in cash.

Until December 31, 2021, Coloradoans should refer to the federal prevailing wage rates set by USDOL pursuant to the Davis-Bacon Act,<sup>7</sup> based on USDOL’s [wage survey](#) program. These rates can be viewed at [SAM.gov](#). Beginning on January 1, 2022, DPA will publish and annually update prevailing wage rates for projects subject to the Act, specific to each trade or occupation and to each geographic locality, on [its website](#).

Bid solicitations must include the prevailing value of **both** wages and benefits contributions for each job category for which employees will be hired to perform on the project. And contracts for public projects must contain terms requiring both the contractor, and any subcontractor it uses for the project, to provide compensation at the rates stated in the solicitation. Contracts must also require that wages be paid at least weekly to all employees working directly at the worksite.

<sup>4</sup> See, e.g., the Davis-Bacon Act, 40 USC 3141 *et. seq.*; see also 29 CFR 5.1(a) (listing related Acts); [US Dep’t of Labor: Davis-Bacon and Related Acts](#).

<sup>5</sup> The language defining “prevailing wage” in the Act is identical to that of the federal Davis-Bacon Act, 40 USC 3141(2), so USDOL regulations and interpretation may provide helpful guidance to the legislature’s intent.

<sup>6</sup> Benefits also must be “ordinary business expense deduction[s] for federal income tax purposes.”

<sup>7</sup> The timeframe for DPA to begin setting prevailing wages was extended from that in the Act by [HB 21-1319](#).

To ensure these requirements are met, contractors and subcontractors must:

- maintain an on-site log of project employees;
- submit their payroll reports and contact information of benefits administrators to DPA each month;
- display [a poster, provided by DPA](#), stating the applicable prevailing wage rates at the job site; and
- ensure there is no retaliation against employees who assert their rights to be paid weekly and to be paid at the prevailing wage.

**How Can An Employee File a Complaint?**

The Act provides that employees who believe they are not being paid the prevailing wage or provided with benefits at the prevailing rate, or have not been paid weekly, must first file a complaint with the Contracting Officer at the agency which contracted for the project. The Department of Labor and Employment has developed this [Public Project Prevailing Wage Complaint Form](#) for employees to use to file a complaint with their contracting agency.

Information regarding the identity of the contracting agency and its Contracting Officer is included on the poster required by the Act and developed by DPA, which must be posted at all project sites. If the poster cannot be located, the employee can request this information from the [Office of the State Architect at DPA](#).

When a government agency receives a complaint from a worker on a project, these steps must be taken:

Step	Time	Who	What
1	48 hours from complaint	Agency	Review project payroll records. If it appears there has been a violation, notify contractor.
2	15 days from notification	Contractor	Either (1) correct underpayment of wages or benefits, or (2) demonstrate they were already correctly paid.
3	After 15 days from notification are up	Agency	Report the violation to the Department of Labor and Employment, Division of Labor Standards and Statistics (DLSS) if it either (1) was willful, or (2) was not corrected within 15 days.
4	Upon receiving agency report or complaint directly from employee	DLSS	Conduct investigation.
5	120 days from DLSS determination <i>and</i> within 3 years of the missed payment	Employee	If the complaint has not been resolved at Step 2 or 4, file a private lawsuit in court to recover the underpaid wages or benefits.

At Step 4, DLSS will investigate all violations reported to it and may require contractors to compensate workers for underpaid wages or benefits **and** to pay fines of up to \$25,000 per willful violation, depending on the number of violations.<sup>8</sup>

At Step 5, an employee may file a private lawsuit individually or on behalf of all employees who experienced the same underpayment. If a court finds that employees were underpaid for wages or benefits, it must award double the amount of the underpayment, plus interest. Courts may also apply additional penalties for any misrepresentations made by an individual or corporation about wage obligations under the Act.

**How Else Are Prevailing Wage Requirements Enforced?**

Government agencies **must** stop payment under existing contracts if weekly payments of prevailing wages are not made. DPA may debar contractors who willfully violate the wage requirements of the Act three or more times in a five year period—barring them from bidding on any future public projects for up to three years.

**Required Use of Apprenticeship Programs by Subcontractors on Public Projects**

<sup>8</sup> See *also* Dep’t of Personnel & Admin., Ofc. of State Architect, [Policies & Procedures: Public Projects](#) (click “Public Projects”). A list of contractors found to have willfully violated the Act will be made publicly available on CDLE’s website. A violation is “willful” if it is intentional or made with reckless disregard for, or deliberate ignorance of, the law.

Contractors on state-funded public projects of \$1 million or more may only hire firms that participate in state or federally registered apprenticeship programs as subcontractors for the following types of work:

- mechanical,
- sheet metal,
- fire suppression,
- sprinkler fitting,
- electrical, and
- plumbing.

Like the prevailing wage requirement, this requirement does **not** apply to contracts for any public project that receives federal funding, to any contracts awarded by the Colorado Department of Transportation, or to political subdivisions of the state.

### What Apprenticeship Programs Qualify Under the Act?

Apprenticeship programs must be registered either with the federal [Department of Labor's Employment and Training Administration](#) (USDOL), or with the [Colorado State Apprenticeship Agency](#) (SAA). They must also have a proven record of graduating apprentices, with the required completion rate increasing over time:

- From July 1, 2021 to June 30, 2026, a 15% completion rate for at least three of the past five years;
- From July 1, 2026 to June 30, 2031, a 20% completion rate for at least three of the past five years;
- From July 1, 2031 on, a 30% completion rate for at least three of the past five years.

Apprenticeship programs that do not have the required track record may petition the Colorado Department of Labor and Employment (CDLE) for conditional approval by contacting [apprenticeship@state.co.us](mailto:apprenticeship@state.co.us). These programs must still certify that they have been registered with USDOL or the SAA for at least six months and have sufficient facilities, personnel and resources to provide "bona fide apprenticeship training." Conditional approval can last up to five years, but must be reviewed annually by CDLE to verify that the program is admitting new apprentices each year and advancing at least 10% of them annually.

Finally, a contracting agency may waive the apprenticeship requirement for project subcontractors **only** if it determines that no eligible subcontractors responded to a request for bids. Agencies must post all waivers and the specific reasons for the waiver on their websites.

### How Must Contractors Verify Compliance?

A contractor must inform the agency overseeing the contract of the identities of the subcontractors it hires, and must certify and submit supporting documents from USDOL verifying that they participate in programs meeting the criteria outlined above. Contracting agencies must publish this documentation on their websites.

### How is the Apprenticeship Program Requirement Enforced?

There are several enforcement mechanisms if the apprenticeship requirements are violated:

- Contracting agencies **must** direct a contractor to terminate and remove any subcontractor that willfully falsified documents or made misrepresentations related to the apprenticeship program requirement.
- DPA may take action to debar the subcontractor from work on public projects for up to three years.
- The legislative audit committee may authorize the state auditor's office to investigate noncompliance.
- The state Attorney General's office may investigate any allegations of collusion.

**For More Information:** Visit the Division [website](#), call 303-318-8441, or email [cdle\\_labor\\_standards@state.co.us](mailto:cdle_labor_standards@state.co.us).