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## STATE OF NEVADA



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### Department of Business & Industry OFFICE OF THE LABOR COMMISSIONER

May 9, 2018

Mr. Adam K. Bult, Esq.  
BROWNSTEIN HYATT FARBER SCHRECK, LLP  
100 North City Parkway, Suite 1600  
Las Vegas, NV 89106

**Re: Advisory Opinion – Prevailing Wage Rate of Multiple Job Classifications**

Dear Mr. Bult:

#### **BACKGROUND:**

You have requested an opinion on what the Prevailing Wage rate should be when an employee/worker employed at the site of a Public Works Project works more than one Job Classification on an electrical contract and/or where the main scope of work involves the Job Classification of Electrician Wireman Journeyman, Electrician Wireman Cable Splicer, Electrician Wireman Foreman, and Electrician General Foreman.

The Office of the Labor Commissioner has previously received and resolved claims and disputes involving similar issues, and continues to receive questions, claims, and complaints on this question. While prior requests may have been characterized in a different fashion, such as “Gear Up/Gear Down Time (1 hour of Laborer Group 1 pay per day) and Laborer Group 3 pay,” the basic question is the same and involves payment at a different Prevailing Wage Rate and Job Classification during a single workday.

It should also be noted that based on the knowledge available to the Office of the Labor Commissioner at the time of issuance of this Advisory Opinion, these issues arise primarily with non-union contractors in Clark County and not statewide.

Nothing in this Advisory Opinion shall impact any Collective Bargaining Agreements (“CBA”s) that already address these issues and/or specify the payment rate and method for employees/workers that fall under that CBA. In addition, nothing in this Advisory Opinion shall preclude any employee/worker from working for multiple Contractors/Sub Contractors and performing different duties and/or Job Classifications on private projects.

Pursuant to Nevada Administrative Code (NAC) section 607.040, the Labor Commissioner finds that good cause exists to issue an Advisory Opinion pursuant to 607.650 to clarify the position of the Office of the Labor Commissioner on this issue.

### **QUESTIONS/ISSUES PRESENTED:**

The questions that have been raised including the following:

- (1) **Question:** Can a worker/employee work more than one Job Classification on a Public Works Project?

**Answer:** Yes, this is permitted. It is recommended that an employer choose one rate of pay based on the Recognized Class of Worker, Job Classification, Job Description, and Scope of Work to be performed and schedule employees accordingly based on the majority of the actual work to be performed in that workday.

The practice of splitting or having multiple Job Classifications for one employee/worker in a workday creates additional administrative obligations that should be accounted for by the employer, Contractor/Subcontractor and the Awarding/Public Body when reviewing Certified Payroll Reports (CPR's). It is not recommended to pay a rate lower than that required for the majority of the work being performed during the workday, or when the lower rate is inconsistent with the Recognized Class of Worker, Job Classification, Job Description, and Scope of Work to be performed under the contract. This practice can result in misclassification of workers, and required further investigation from the Office of the Labor Commissioner.

An employer can pay a higher rate than required for work performed within a lower-paid Job Classification and Job Description based on the work performed according to that Job Classification and Job Description, such as a Laborer 1 being paid as a Laborer Group 3 or 4 instead of a Laborer 1, or an Operator being paid in a higher Group Classification. However, the employer should be consistent in what Job Classification they are using for the higher rate and maintain proper records to support this practice.

- (2) **Question:** What should the Prevailing Wage Rate be when a worker/employee works more than one Job Classification on a Public Works Project in one workday?

**Answer:** The Prevailing Wage Rate should be the rate for the majority of hours for the actual work performed for that Recognized Class of Worker, Job Classification and Job Description. For example, if the employee/worker works seven (7) hours as an Electrician Journeyman, the rate of pay for the entire eight (8) hour day and any applicable overtime should be calculated on the Electrician Journeyman rate. The Job Classification and Job Description for an Electrician Journeyman in Clark County

includes the “Handling and installation of all electrical equipment, appliances, apparatus and materials at the site of the public work and necessary to the execution of the contract for the public work.”

- (3) **Question:** What is the rate of pay for a Foreman and/or General Foreman on the Project and when should a Foreman be present and reported on Certified Payroll Reports on a Public Works Project?

**Answer:** If there is a designated Foreman on the Project including, an Electrician Wireman Foreman and/or Electrician General Foreman, they should be paid as a Foreman based on those categories for the entire workday and for any overtime at the Foreman and/or General Foreman Rate.

Pursuant to NAC 338.015 as set forth below, “a foreman is a person who works with and supervises one or more journeymen performing a craft or type of work, and a general foreman is a person who works with and supervises one or more journeymen performing a craft or type of work, including, without limitation, one or more foremen.”

If there are one or more journeyman on the Project, there should be a designated Foreman and/or General Foreman who is supervising the work of the journeymen and/or foremen as applicable.

This is consistent with industry practice and previous interpretations by the Office of the Labor Commissioner.

- (4) **Question:** Are there exemptions to paying the required Prevailing Wage Rate for the Recognized Class of Worker, Job Classification, and Job Description?

**Answer:** Exemptions to the Prevailing Wage requirements include the following: (1) Contracts awarded which are directly related to the normal operation of the Public Body or the normal maintenance of its property (NRS 338.011); (2) Contracts awarded to meet an emergency which threatens the health, safety, or welfare of the public (NRS 338.011); (3) Any contract for a public work under \$250,000 and charter schools construction (Assembly Bill 172-2015 Legislative Session); (4) Apprentices recorded under the provisions of NRS 610 (NRS 338.080); (5) Any work performed by or for any railroad company (NRS 338.080); and (6) Design professionals as defined under NRS 338.010.

An apprentice is only those workers as defined in NAC section 338.0052: “A person employed and individually registered in a bona fide apprenticeship program with the Bureau of Apprenticeship and Training of the Office of Apprenticeship, Training, Employer and Labor Services of the Employment and Training Administration of the United States Department of Labor or its successor, and The Nevada State Apprenticeship Council pursuant to chapter 610 of the NRS.”

## **APPLICABLE LAWS AND REGULATIONS:**

The Office of the Labor Commissioner is responsible for the enforcement of the laws and regulations governing Public Works Projects and the Payment of the Prevailing Wage Nevada Revised Statutes (NRS) sections 338.010 through 338.090, inclusive, and Nevada Administrative Code (NAC) sections 338.005 through 338.125, inclusive. In addition, the existence of a contract between an awarding body and a contractor is not a bar to the enforcement by the Labor Commissioner or the awarding body of the provisions of NRS 338.010 to 338.090, inclusive, and NAC 338.005 to 338.125, inclusive.

Nevada Revised Statutes (NRS) section 338.010, sub-section 17 defines a Public Work as follows: "Public work" means any project for the new construction, repair or reconstruction of the following:

- (a) A project financed in whole or in part from public money for:
  - (1) Public buildings;
  - (2) Jails and prisons;
  - (3) Public roads;
  - (4) Public highways;
  - (5) Public streets and alleys;
  - (6) Public utilities;
  - (7) Publicly owned water mains and sewers;
  - (8) Public parks and playgrounds;
  - (9) Public convention facilities which are financed at least in part with public money; and
  - (10) All other publicly owned works and property.

NRS section 338.010 defines Wages as: (a) The basic hourly rate of pay; and (b) the amount of pension, health and welfare, vacation and holiday pay, the cost of apprenticeship training or other similar programs or other bona fide fringe benefits which are a benefit to the worker.

NRS section 338.020 requires payment of the prevailing wage on public works projects and states in relevant part as follows:

1. Every contract to which a public body of this State is a party, requiring the employment of skilled mechanics, skilled workers, semiskilled mechanics, semiskilled workers or unskilled labor in the performance of public work, must contain in express terms the hourly and daily rate of wages to be paid each of the classes of mechanics and workers. The hourly and daily rate of wages must:

(a) Not be less than the rate of such wages then prevailing in the county in which the public work is located, which prevailing rate of wages must have been determined in the manner provided in NRS 338.030; and

(b) Be posted on the site of the public work in a place generally visible to the workers.

NRS section 338.030 and NAC section 338.010 govern the procedure and method for determining the Prevailing Wage Rate for each job classification/sub classification within each County in the State of Nevada.

NRS section 338.012 and NAC section 338.007 provide the authority for the Labor Commissioner to establish classes of workers. It states in relevant part:

“Recognized class of workers” defined. (NRS 338.012) Recognized class of workers” means a class of workers recognized by the Labor Commissioner as being a distinct craft or type of work for purposes of establishing prevailing rates of wages. The term includes a class of workers for which the Labor Commissioner has traditionally established a prevailing rate of wages and any other class of workers the Labor Commissioner determines to be a distinct craft or type of work either on his or her own accord or after conducting a hearing pursuant to NAC 338.090.<sup>1</sup>

NAC section 338.015 provides the authority to determine the Prevailing Wage rate for sub classifications of workers.

Recognized classes of workers: Sub classifications; determination of prevailing rate of wages for each craft or type of work among class.

1. The sub classifications within the recognized classes of workers include, without limitation:

(a) Foreman. A foreman is a person who works with and supervises one or more journeymen performing a craft or type of work.

(b) General foreman. A general foreman is a person who works with and supervises one or more journeymen performing a craft or type of work, including, without limitation, one or more foremen.

(c) Journeyman. A journeyman is a skilled mechanic, skilled worker, semiskilled mechanic, semiskilled worker or unskilled worker performing a craft or type of work.

2. The Labor Commissioner will consider the kind of information described in subsection 2 of NAC 338.020 to determine the applicable prevailing wage for each craft or type of work among the recognized class of workers.

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<sup>1</sup> “The Labor Commissioner’s classification of the craft or work is an inherent part of determining prevailing wages.” *City Plan Dev. Inc. v. Office of the Labor Comm’r*, 121 Nev. 419, 432, 117 P.3d 182, 190 (2005).

NRS section 338.040 sets forth the requirements for when workers are deemed to be employed on public works.

Workers deemed to be employed on public works.

1. Except as otherwise provided by specific statute, workers who are:
  - (a) Employed at the site of a public work; and
  - (b) Necessary in the execution of the contract for the public work, are deemed to be employed on public works.
2. The Labor Commissioner shall adopt regulations to define the circumstances under which a worker is:
  - (a) Employed at the site of a public work; and
  - (b) Necessary in the execution of the contract for the public work.

NAC section 338.009 provides as follows:

1. As used in NRS 338.040, the Labor Commissioner will interpret:
  - (a) "Employed at the site of a public work" to mean the performance of work in the execution of a contract for a public work at the physical place or places at which the work is performed or at which a significant portion of the public work is constructed, altered or repaired if such place is established specifically for the execution of the contract for the public work or dedicated exclusively, or nearly so, to the execution of the contract for the public work.
  - (b) "Necessary in the execution of the contract for the public work" to mean the performance of duties required to construct, alter or repair the public work and without which the public work could not be completed.
2. As used in this section, "site of a public work" includes job headquarters, a tool yard, batch plant, borrow pit or any other location that is established for the purpose of executing the contract for the public work or that is dedicated exclusively, or nearly so, to executing the contract for the public work. The term does not include a permanent home office, branch plant establishment, fabrication plant, tool yard or any other operation of a contractor, subcontractor or supplier if the location or the continued existence of the operation is determined without regard to a particular public work.

NAC section 338.0095 subdivision (1)(a) and (b) and subdivision (2) set forth the requirements for payment of the prevailing wage on public works projects.

- 1.(a) A worker employed on a public work must be paid the applicable prevailing rate of wage for the type of work that the worker actually performs on the public work and in accordance with the recognized class

of the worker; and

(b) Each contractor and subcontractor shall be deemed to be the employer of each worker and apprentice who performs work directly for that contractor or subcontractor in the execution of a contract for a public work, whether the worker or apprentice is employed directly by the contractor or subcontractor or is furnished to the contractor or subcontractor by or through another person or entity such as an employee leasing company or equipment rental business.

2. Any person employed on a public work as an apprentice or listed as an apprentice who is not registered with the Bureau of Apprenticeship and Training of the Office of Apprenticeship, Training, Employer and Labor Services of the Employment and Training Administration of the United States Department of Labor or its successor and the State Apprenticeship Council must not be paid less than the applicable wage rate for the type of work actually performed by the person and in accordance with the applicable recognized class of workers.”

### **CONCLUSION:**

While this Advisory Opinion addressed issues presented relating to Electrical Contracts and the Recognized Class of Worker, Job Classification, and Job Description relating to an Electrician, it is the opinion of the Labor Commissioner that this Advisory Opinion could be applied to other Public Works Projects that involve the same and/or similar questions above. It is recommended that the Awarding/Public Body and/or Contractor/Subcontractor contact the Office of the Labor Commissioner to discuss having employees/workers perform multiple Job Classifications in a workday before commencing this practice. This typically would not apply to Contractors/Subcontractors who are signatory to CBA agreements.

Please also be advised that this Advisory Opinion is limited to the specific facts and circumstances described herein. Please be further advised that subsequent statutory or administrative rule changes or judicial interpretation of the statutes or rules upon which any opinion is based may require that this Advisory Opinion be modified or abandoned.

Should you need any additional clarification, please do not hesitate to contact me at your earliest opportunity at (775) 684-1890.

Sincerely,



Shannon M. Chambers  
Labor Commissioner