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SENATE BILL 5035

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State of Washington

66th Legislature

2019 Regular Session

By Senators Saldaña, Hasegawa, Conway, and Keiser; by request of Attorney General

Prefiled 12/21/18.

1 AN ACT Relating to enhancing the prevailing wage laws to ensure  
2 contractor and owner accountability and worker protection; amending  
3 RCW 39.12.010, 39.12.050, and 39.12.065; adding a new section to  
4 chapter 39.12 RCW; creating a new section; prescribing penalties; and  
5 providing an effective date.

6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

7 NEW SECTION. **Sec. 1.** The legislature finds:

8 (1) That from the shift in the 1980s from criminal to civil  
9 penalties for prevailing wage violations that the law needs some  
10 enhancements to effectively provide the department of labor and  
11 industries with the ability to utilize its civil remedies to both  
12 discourage and penalize repeat and willful violations of the law.

13 (2) The doctrine of substantial compliance shall not be used by  
14 the department of labor and industries in the application and  
15 construction of chapter 39.12 RCW. Anyone engaged in public works  
16 construction is presumed to know the requirements of chapter 39.12  
17 RCW.

18 (3) Revisions to chapter 39.12 RCW are long overdue and are  
19 necessary to appropriately address filing and reporting procedures  
20 and penalties, which are necessary to strengthen enforcement of and  
21 deterrence from repeat and/or willful violations of the chapter.

1       **Sec. 2.** RCW 39.12.010 and 1989 c 12 s 6 are each amended to read  
2 as follows:

3       (1) The "prevailing rate of wage" (~~((, for the intents and purposes~~  
4 ~~of this chapter, shall be))~~) is the rate of hourly wage, usual  
5 benefits, and overtime paid in the locality, as hereinafter defined,  
6 to the majority of workers, laborers, or mechanics, in the same trade  
7 or occupation. In the event that there is not a majority in the same  
8 trade or occupation paid at the same rate, then the average rate of  
9 hourly wage and overtime paid to such laborers, workers, or mechanics  
10 in the same trade or occupation (~~(shall be))~~) is the prevailing rate.  
11 If the wage paid by any contractor or subcontractor to laborers,  
12 workers, or mechanics on any public work is based on some period of  
13 time other than an hour, the hourly wage (~~((for the purposes of this~~  
14 ~~chapter shall be))~~) is mathematically determined by the number of  
15 hours worked in such period of time.

16       (2) The "locality" (~~((for the purposes of this chapter shall be))~~)  
17 is the largest city in the county wherein the physical work is being  
18 performed.

19       (3) The "usual benefits" (~~((for the purposes of this chapter~~  
20 ~~shall))~~) includes the amount of:

21       (a) The rate of contribution irrevocably made by a contractor or  
22 subcontractor to a trustee or to a third person pursuant to a fund,  
23 plan, or program; (~~(and)~~)

24       (b) The rate of costs to the contractor or subcontractor, which  
25 may be reasonably anticipated in providing benefits to workers,  
26 laborers, and mechanics pursuant to an enforceable commitment to  
27 carry out a financially responsible plan or program which was  
28 communicated in writing to the workers, laborers, and mechanics  
29 affected, for medical or hospital care, pensions on retirement or  
30 death, compensation for injuries or illness resulting from  
31 occupational activity, or insurance to provide any of the foregoing,  
32 for unemployment benefits, life insurance, disability and sickness  
33 insurance, or accident insurance, for vacation and holiday pay, for  
34 defraying costs of apprenticeship or other similar programs, or for  
35 other bona fide fringe benefits, but only where the contractor or  
36 subcontractor is not required by other federal, state, or local law  
37 to provide any of such benefits; and

38       (c) The effective annual rate of contributions for all hours,  
39 public and private, worked during the year by an employee, commonly  
40 referred to as annualization of benefits.

1 (4) An "interested party" (~~for the purposes of this chapter~~  
2 ~~shall~~)) includes a contractor, subcontractor, an employee of a  
3 contractor or subcontractor, an organization whose members' wages,  
4 benefits, and conditions of employment are affected by this chapter,  
5 and the director of labor and industries or the director's designee.

6 (5) An "inadvertent filing or reporting error" is a mistake that  
7 occurs only once and is made notwithstanding the use of due care by  
8 the contractor or employer.

9 (6) "Unpaid prevailing wages" or "unpaid wages" means the  
10 employer fails to pay all compensation owed for any workweek by the  
11 regularly established pay day for the period in which the workweek  
12 ends. Every employer must pay all wages, other than fringe benefits,  
13 owing to its employees not less than twice a month.

14 **Sec. 3.** RCW 39.12.050 and 2009 c 219 s 3 are each amended to  
15 read as follows:

16 (1) Any contractor or subcontractor who files a false statement  
17 or fails to file any statement or record required to be filed or  
18 posted under this chapter and the rules adopted under this chapter,  
19 shall, after a determination to that effect has been issued by the  
20 director after hearing under chapter 34.05 RCW, forfeit as a civil  
21 penalty the sum of five hundred dollars for each false filing or  
22 failure to file, and shall not be permitted to bid, or have a bid  
23 considered, on any public works contract until the penalty has been  
24 paid in full to the director. The civil penalty under this subsection  
25 (~~shall~~) does not apply to a violation determined by the director to  
26 be an inadvertent filing or reporting error. The director shall  
27 consider whether or not the contractor or employer has attended the  
28 required training under RCW 39.04.350 both for determining if the  
29 violation may be applied and for enhancing the curriculum of the  
30 required training provided by the department. The burden of proving  
31 that an error is inadvertent rests with the contractor or employer  
32 charged with the error. Civil penalties shall be deposited in the  
33 public works administration account.

34 To the extent that a contractor or subcontractor has not paid  
35 wages at the rate due pursuant to RCW 39.12.020, and a finding to  
36 that effect has been made as provided by this subsection, such unpaid  
37 wages (~~shall~~) constitute a lien against the bonds and retainage as  
38 provided in RCW 18.27.040, 19.28.041, 39.08.010, and 60.28.011.

1 (2) If a contractor or subcontractor is found to have violated  
2 the provisions of subsection (1) of this section for a second time  
3 within a five year period, the contractor or subcontractor (~~shall~~  
4 ~~be~~) is subject to the sanctions prescribed in subsection (1) of this  
5 section and shall not be allowed to bid on any public works contract  
6 for one year. The one year period (~~shall~~) runs from the date of  
7 notice by the director of the determination of noncompliance. When an  
8 appeal is taken from the director's determination, the one year  
9 period (~~shall~~) commences from the date of the final determination  
10 of the appeal.

11 The director shall issue his or her findings that a contractor or  
12 subcontractor has violated the provisions of this subsection after a  
13 hearing held subject to the provisions of chapter 34.05 RCW.

14 **Sec. 4.** RCW 39.12.065 and 2009 c 219 s 4 are each amended to  
15 read as follows:

16 (1) Upon complaint by an interested party, the director of labor  
17 and industries shall cause an investigation to be made to determine  
18 whether there has been compliance with this chapter and the rules  
19 adopted hereunder, and if the investigation indicates that a  
20 violation may have occurred, a hearing shall be held in accordance  
21 with chapter 34.05 RCW. The director shall issue a written  
22 determination including his or her findings after the hearing. A  
23 judicial appeal from the director's determination may be taken in  
24 accordance with chapter 34.05 RCW, with the prevailing party entitled  
25 to recover interest on the wages at the highest rate allowed under  
26 RCW 19.52.025, and reasonable costs and attorneys' fees.

27 A complaint concerning nonpayment of the prevailing rate of wage  
28 shall be filed with the department of labor and industries no later  
29 than (~~thirty~~) one hundred twenty days from the acceptance date of  
30 the public works project. The failure to timely file such a complaint  
31 (~~shall~~) does not prohibit the department from investigating the  
32 matter in pursuit of the recovery of unpaid wages for the worker(s).  
33 However, the department may only recover owed wages and may not  
34 charge a contractor or subcontractor with a violation of this section  
35 if the complaint is filed after the one hundred twenty day limit. The  
36 failure to timely file such a complaint also does not prohibit a  
37 claimant from pursuing a private right of action against a contractor  
38 or subcontractor for unpaid prevailing wages. The remedy provided by

1 this section is not exclusive and is concurrent with any other remedy  
2 provided by law.

3 (2) To the extent that a contractor or subcontractor has not paid  
4 the prevailing rate of wage under a determination issued as provided  
5 in subsection (1) of this section, the director shall notify the  
6 agency awarding the public works contract of the amount of the  
7 violation found, and the awarding agency shall withhold, or in the  
8 case of a bond, the director shall proceed against the bond in  
9 accordance with the applicable statute to recover, such amount from  
10 the following sources in the following order of priority until the  
11 total of such amount is withheld:

12 (a) The retainage or bond in lieu of retainage as provided in RCW  
13 60.28.011;

14 (b) If the claimant was employed by the contractor or  
15 subcontractor on the public works project, the bond filed by the  
16 contractor or subcontractor with the department of labor and  
17 industries as provided in RCW 18.27.040 and 19.28.041;

18 (c) A surety bond, or at the contractor's or subcontractor's  
19 option an escrow account, running to the director in the amount of  
20 the violation found; and

21 (d) That portion of the progress payments which is properly  
22 allocable to the contractor or subcontractor who is found to be in  
23 violation of this chapter. Under no circumstances (~~((shall))~~) does any  
24 portion of the progress payments be withheld that are properly  
25 allocable to a contractor, subcontractor, or supplier, that is not  
26 found to be in violation of this chapter.

27 The amount withheld shall be released to the director to  
28 distribute in accordance with the director's determination.

29 (3) A contractor or subcontractor that is found, in accordance  
30 with subsection (1) of this section, to have violated the requirement  
31 to pay the prevailing rate of wage (~~((shall-be))~~) is subject to a civil  
32 penalty of not less than (~~((one))~~) five thousand dollars or an amount  
33 equal to (~~((twenty))~~) fifty percent of the total prevailing wage  
34 violation found on the contract, whichever is greater, and (~~((shall))~~)  
35 is not (~~((be))~~) permitted to bid, or have a bid considered, on any  
36 public works contract until such civil penalty has been paid in full  
37 to the director. If a contractor or subcontractor is found to have  
38 participated in a violation of the requirement to pay the prevailing  
39 rate of wage for a second time within a five-year period, the  
40 contractor or subcontractor (~~((shall-be))~~) is subject to the sanctions

1 prescribed in this subsection and as an additional sanction (~~((shall))~~)  
2 is not (~~((be))~~) allowed to bid on any public works contract for two  
3 years. Civil penalties shall be deposited in the public works  
4 administration account. If a previous or subsequent violation of a  
5 requirement to pay a prevailing rate of wage under federal or other  
6 state law is found against the contractor or subcontractor within  
7 five years from a violation under this section, the contractor or  
8 subcontractor shall not be allowed to bid on any public works  
9 contract for two years. A contractor or subcontractor (~~((shall))~~) is  
10 not (~~((be))~~) barred from bidding on any public works contract if the  
11 contractor or subcontractor relied upon written information from the  
12 department to pay a prevailing rate of wage that is later determined  
13 to be in violation of this chapter. The civil penalty and sanctions  
14 under this subsection (~~((shall))~~) do not apply to a violation  
15 determined by the director to be an inadvertent filing or reporting  
16 error. To the extent that a contractor or subcontractor has not paid  
17 the prevailing wage rate under a determination issued as provided in  
18 subsection (1) of this section, the unpaid wages (~~((shall))~~) constitute  
19 a lien against the bonds and retainage as provided herein and in RCW  
20 18.27.040, 19.28.041, 39.08.010, and 60.28.011.

21 (4) If, after a complaint has been filed, the contractor or  
22 subcontractor elects to pay the unpaid wages that precipitated the  
23 complaint, interest on the wages at the highest rate allowed under  
24 RCW 19.52.025, and penalties in the amount of one thousand dollars or  
25 twenty percent of the total prevailing wage violation determined by  
26 the department of labor and industries, whichever is greater, is  
27 considered resolved without further penalty under subsection (3) of  
28 this section.

29 (5) If a contractor or subcontractor utilizes the process  
30 outlined in subsection (4) of this section for a second time within a  
31 five-year period, the contractor or subcontractor is subject to the  
32 sanctions prescribed in subsection (3) of this section and as an  
33 additional sanction, may not be allowed to bid on any public works  
34 contract for two years.

35 NEW SECTION. Sec. 5. A new section is added to chapter 39.12  
36 RCW to read as follows:

37 (1) Each contractor shall keep accurate payroll records for three  
38 years from the date of acceptance of the public works project by the  
39 contract awarding agency, showing the employee's full name, address,

1 social security number, trade or occupation, classification, straight  
2 and overtime rates, hourly rate of usual benefits, and hours worked  
3 each day and week, including any employee authorizations executed  
4 pursuant to RCW 49.28.065, and the actual gross wages, itemized  
5 deductions, withholdings, and net wages paid, for each laborer,  
6 worker, and mechanic employed by the contractor for work performed on  
7 a public works project.

8 (2) A contractor shall, at least biweekly file a copy of its  
9 certified payroll records using the department of labor and  
10 industries' online system and/or directly with the awarding agency in  
11 a format approved by the department.

12 (3) A contractor's noncompliance with this section constitutes a  
13 violation of RCW 39.12.050.

14 NEW SECTION. **Sec. 6.** This act takes effect January 1, 2020.

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