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**SUBSTITUTE SENATE BILL 5035**

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**State of Washington**

**66th Legislature**

**2019 Regular Session**

**By** Senate Labor & Commerce (originally sponsored by Senators Saldaña, Hasegawa, Conway, Keiser, Wellman, and Kuderer; by request of Attorney General)

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) Revisions to chapter 39.12 RCW are long overdue and are  
14 necessary to appropriately address filing and reporting procedures  
15 and penalties, which are necessary to strengthen enforcement of and  
16 deterrence from repeat and/or willful violations of the chapter.

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

19 (1) The "prevailing rate of wage" (~~(, for the intents and purposes~~  
20 ~~of this chapter, shall be)~~) is the rate of hourly wage, usual

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

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

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

17 (a) The rate of contribution irrevocably made by a contractor or  
18 subcontractor to a trustee or to a third person pursuant to a fund,  
19 plan, or program; and

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

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

1       (5) An "inadvertent filing or reporting error" is a mistake and  
2 is made notwithstanding the use of due care by the contractor,  
3 subcontractor, or employer.

4       (6) "Unpaid prevailing wages" or "unpaid wages" means the  
5 employer fails to pay all of the prevailing rate of wages owed for  
6 any workweek by the regularly established pay day for the period in  
7 which the workweek ends. Every employer must pay all wages, other  
8 than usual benefits, owing to its employees not less than once a  
9 month. Every employer must pay all usual benefits owing to its  
10 employees by the regularly established deadline for those benefits.

11       (7) "Rate of contribution" means the effective annual rate of  
12 usual benefit contributions for all hours, public and private, worked  
13 during the year by an employee (commonly referred to as  
14 "annualization" of benefits). The only exemption to the annualization  
15 requirements is for defined contribution pension plans that have  
16 immediate participation and vesting.

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

19       (1) Any contractor or subcontractor who files a false statement  
20 or fails to file any statement or record required to be filed or  
21 fails to post a document required to be posted under this chapter and  
22 the rules adopted under this chapter, shall, after a determination to  
23 that effect has been issued by the director after hearing under  
24 chapter 34.05 RCW, forfeit as a civil penalty the sum of five hundred  
25 dollars for each false filing or failure to file or post, and shall  
26 not be permitted to bid, or have a bid considered, on any public  
27 works contract until the penalty has been paid in full to the  
28 director. The civil penalty under this subsection (~~shall~~) does not  
29 apply to a violation determined by the director to be an inadvertent  
30 filing or reporting error. The burden of proving, by a preponderance  
31 of the evidence, that an error is inadvertent rests with the  
32 contractor or subcontractor charged with the error. Civil penalties  
33 shall be deposited in the 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~~) the notice of violation becomes final.

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, unless a  
14 notice of violation is not timely appealed. A notice of violation not  
15 timely appealed is final and binding, and not subject to further  
16 appeal.

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

19 (1) Upon complaint by an interested party, the director of labor  
20 and industries shall cause an investigation to be made to determine  
21 whether there has been compliance with this chapter and the rules  
22 adopted hereunder, and if the investigation indicates that a  
23 violation may have occurred, the department of labor and industries  
24 may issue a notice of violation for unpaid wages, penalties, and  
25 interest on all wages owed at one percent per month. A hearing shall  
26 be held following a timely appeal of the notice of violation in  
27 accordance with chapter 34.05 RCW. The director shall issue a written  
28 determination including his or her findings after the hearing unless  
29 a notice of violation is not timely appealed. A notice of violation  
30 not timely appealed is final and binding, and not subject to further  
31 appeal. A judicial appeal from the director's determination may be  
32 taken in accordance with chapter 34.05 RCW, with the prevailing party  
33 entitled to recover reasonable costs and attorneys' fees.

34 A complaint concerning nonpayment of the prevailing rate of wage  
35 shall be filed with the department of labor and industries no later  
36 than (~~thirty~~) sixty days from the acceptance date of the public  
37 works project. The department may not charge a contractor or  
38 subcontractor with a violation of this section when responding to a  
39 complaint filed after the sixty-day limit. The failure to timely file

1 such a complaint (~~shall~~) does not prohibit the department from  
2 investigating the matter and recovering unpaid wages for the  
3 worker(s) within two years from the acceptance of the public works  
4 contract. The department may not investigate or recover unpaid wages  
5 if the complaint is filed after two years from the acceptance of a  
6 public works contract. The failure to timely file such a complaint  
7 also does not prohibit a claimant from pursuing a private right of  
8 action against a contractor or subcontractor for unpaid prevailing  
9 wages. The remedy provided by this section is not exclusive and is  
10 concurrent with any other remedy provided by law.

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

20 (a) The retainage or bond in lieu of retainage as provided in RCW  
21 60.28.011;

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

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

29 (d) That portion of the progress payments which is properly  
30 allocable to the contractor or subcontractor who is found to be in  
31 violation of this chapter. Under no circumstances shall any portion  
32 of the progress payments be withheld that are properly allocable to a  
33 contractor, subcontractor, or supplier, that is not found to be in  
34 violation of this chapter.

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

37 (3) A contractor or subcontractor that is found, in accordance  
38 with subsection (1) of this section, to have violated the requirement  
39 to pay the prevailing rate of wage (~~shall be~~) is subject to a civil  
40 penalty of not less than (~~one~~) five thousand dollars or an amount

1 equal to (~~twenty~~) fifty percent of the total prevailing wage  
2 violation found on the contract, whichever is greater, interest on  
3 all wages owed at one percent per month, and (~~shall~~) is not (~~be~~)  
4 permitted to bid, or have a bid considered, on any public works  
5 contract until such civil penalty has been paid in full to the  
6 director. If a contractor or subcontractor is found to have  
7 participated in a violation of the requirement to pay the prevailing  
8 rate of wage for a second time within a five-year period, the  
9 contractor or subcontractor (~~shall-be~~) is subject to the sanctions  
10 prescribed in this subsection and as an additional sanction (~~shall~~)  
11 is not (~~be~~) allowed to bid on any public works contract for two  
12 years. Civil penalties shall be deposited in the public works  
13 administration account. If a previous or subsequent violation of a  
14 requirement to pay a prevailing rate of wage under federal or other  
15 state law is found against the contractor or subcontractor within  
16 five years from a violation under this section, the contractor or  
17 subcontractor shall not be allowed to bid on any public works  
18 contract for two years. The two-year period runs from the date of  
19 notice by the director of the determination of noncompliance. When an  
20 appeal is taken from the director's determination, the two-year  
21 period commences from the date of the notice of violation becomes  
22 final. A contractor or subcontractor (~~shall~~) is not (~~be~~) barred  
23 from bidding on any public works contract if the contractor or  
24 subcontractor relied upon written information from the department to  
25 pay a prevailing rate of wage that is later determined to be in  
26 violation of this chapter. The civil penalty and sanctions under this  
27 subsection (~~shall~~) do not apply to a violation determined by the  
28 director to be an inadvertent filing or reporting error. To the  
29 extent that a contractor or subcontractor has not paid the prevailing  
30 wage rate under a determination issued as provided in subsection (1)  
31 of this section, the unpaid wages (~~shall~~) constitute a lien against  
32 the bonds and retainage as provided herein and in RCW 18.27.040,  
33 19.28.041, 39.08.010, and 60.28.011.

34 (4) The director may waive or reduce a penalty or additional  
35 sanction under this section including, but not limited to, when the  
36 director determines the contractor or subcontractor paid all wages  
37 and interest or there was an inadvertent filing or reporting error.  
38 The director may not waive or reduce interest. The department of  
39 labor and industries shall regularly submit a report of the waivers

1 made under this section, including a justification for any waiver  
2 made, upon request of an interested party.

3 (5) If, after the department of labor and industries initiates an  
4 investigation and before a notice of violation of unpaid wages, the  
5 contractor or subcontractor pays the unpaid wages identified in the  
6 investigation, interest on all wages owed at one percent per month,  
7 and penalties in the amount of one thousand dollars or twenty percent  
8 of the total prevailing wage violation determined by the department  
9 of labor and industries, whichever is greater, then the violation is  
10 considered resolved without further penalty under subsection (3) of  
11 this section.

12 (6) A contractor or subcontractor may only utilize the process  
13 outlined in subsection (5) of this section if the department of labor  
14 and industries has not issued a notice of violation that resulted in  
15 final judgment under this section against that contractor or  
16 subcontractor in the last five-year period. If a contractor or  
17 subcontractor utilizes the process outlined in subsection (5) of this  
18 section for a second time within a five-year period, the contractor  
19 or subcontractor is subject to the sanctions prescribed in subsection  
20 (3) of this section and may not be allowed to bid on any public works  
21 contract for two years.

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

24 (1) Each contractor, subcontractor, or employer shall keep  
25 accurate payroll records for three years from the date of acceptance  
26 of the public works project by the contract awarding agency, showing  
27 the employee's full name, address, social security number, trade or  
28 occupation, classification, straight and overtime rates, hourly rate  
29 of usual benefits, and hours worked each day and week, including any  
30 employee authorizations executed pursuant to RCW 49.28.065, and the  
31 actual gross wages, itemized deductions, withholdings, and net wages  
32 paid, for each laborer, worker, and mechanic employed by the  
33 contractor for work performed on a public works project.

34 (2) A contractor, subcontractor, or employer shall file a copy of  
35 its certified payroll records using the department of labor and  
36 industries' online system at least once per month. If the department  
37 of labor and industries' online system is not used, a contractor,  
38 subcontractor, or employer shall file a copy of its certified payroll  
39 records directly with the department of labor and industries and the

1 awarding agency in a format approved by the department of labor and  
2 industries at least once per month.

3 (3) A contractor, subcontractor, or employer's noncompliance with  
4 this section constitutes a violation of RCW 39.12.050.

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

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