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ENGROSSED 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)

READ FIRST TIME 02/14/19.

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.

39 (5) An "inadvertent filing or reporting error" is a mistake and  
40 is made notwithstanding the use of due care by the contractor,

1 subcontractor, or employer. An inadvertent filing or reporting error  
2 includes a contractor who, in good faith, relies on a written  
3 determination provided by the department of labor and industries and  
4 pays its workers, laborers, and mechanics accordingly, but is later  
5 found to have not paid the proper prevailing wage rate.

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

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

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

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

36 To the extent that a contractor or subcontractor has not paid  
37 wages at the rate due pursuant to RCW 39.12.020, and a finding to  
38 that effect has been made as provided by this subsection, such unpaid

1 wages (~~shall~~) constitute a lien against the bonds and retainage as  
2 provided in RCW 18.27.040, 19.28.041, 39.08.010, and 60.28.011.

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

13 The director shall issue his or her findings that a contractor or  
14 subcontractor has violated the provisions of this subsection after a  
15 hearing held subject to the provisions of chapter 34.05 RCW, unless a  
16 notice of violation is not timely appealed. A notice of violation not  
17 timely appealed is final and binding, and not subject to further  
18 appeal.

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

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

36 A complaint concerning nonpayment of the prevailing rate of wage  
37 shall be filed with the department of labor and industries no later  
38 than (~~thirty~~) sixty days from the acceptance date of the public  
39 works project. The department may not charge a contractor or

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

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

22 (a) The retainage or bond in lieu of retainage as provided in RCW  
23 60.28.011;

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

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

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

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

39 (3) A contractor or subcontractor that is found, in accordance  
40 with subsection (1) of this section, to have violated the requirement

1 to pay the prevailing rate of wage (~~(shall be)~~) is subject to a civil  
2 penalty of not less than (~~(one)~~) five thousand dollars or an amount  
3 equal to (~~(twenty)~~) fifty percent of the total prevailing wage  
4 violation found on the contract, whichever is greater, interest on  
5 all wages owed at one percent per month, and (~~(shall)~~) is not (~~(be)~~)  
6 permitted to bid, or have a bid considered, on any public works  
7 contract until such civil penalty has been paid in full to the  
8 director. If a contractor or subcontractor is found to have  
9 participated in a violation of the requirement to pay the prevailing  
10 rate of wage for a second time within a five-year period, the  
11 contractor or subcontractor (~~(shall be)~~) is subject to the sanctions  
12 prescribed in this subsection and as an additional sanction (~~(shall)~~)  
13 is not (~~(be)~~) allowed to bid on any public works contract for two  
14 years. Civil penalties shall be deposited in the public works  
15 administration account. If a previous or subsequent violation of a  
16 requirement to pay a prevailing rate of wage under federal or other  
17 state law is found against the contractor or subcontractor within  
18 five years from a violation under this section, the contractor or  
19 subcontractor shall not be allowed to bid on any public works  
20 contract for two years. The two-year period runs from the date of  
21 notice by the director of the determination of noncompliance. When an  
22 appeal is taken from the director's determination, the two-year  
23 period commences from the date of the notice of violation becomes  
24 final. A contractor or subcontractor (~~(shall)~~) is not (~~(be)~~) barred  
25 from bidding on any public works contract if the contractor or  
26 subcontractor relied upon written information from the department to  
27 pay a prevailing rate of wage that is later determined to be in  
28 violation of this chapter. The civil penalty and sanctions under this  
29 subsection (~~(shall)~~) do not apply to a violation determined by the  
30 director to be an inadvertent filing or reporting error. To the  
31 extent that a contractor or subcontractor has not paid the prevailing  
32 wage rate under a determination issued as provided in subsection (1)  
33 of this section, the unpaid wages (~~(shall)~~) constitute a lien against  
34 the bonds and retainage as provided herein and in RCW 18.27.040,  
35 19.28.041, 39.08.010, and 60.28.011.

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

1 labor and industries shall regularly submit a report of the waivers  
2 made under this section, including a justification for any waiver  
3 made, upon request of an interested party.

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

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

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

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

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

1 records directly with the department of labor and industries in a  
2 format approved by the department of labor and industries at least  
3 once per month.

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

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

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