

OFFICE OF THE SECRETARY OF STATE

TOBIAS READ
SECRETARY OF STATE

MICHAEL KAPLAN
DEPUTY SECRETARY OF STATE



ARCHIVES DIVISION

STEPHANIE CLARK
DIRECTOR

800 SUMMER STREET NE
SALEM, OR 97310
503-373-0701

TEMPORARY ADMINISTRATIVE ORDER
INCLUDING STATEMENT OF NEED & JUSTIFICATION

BLI 3-2025

CHAPTER 839

BUREAU OF LABOR AND INDUSTRIES

FILED

01/24/2025 4:44 PM
ARCHIVES DIVISION
SECRETARY OF STATE
& LEGISLATIVE COUNSEL

FILING CAPTION: Amends rules to describe application of prevailing wage to delivery drivers.

EFFECTIVE DATE: 02/01/2025 THROUGH 07/27/2025

AGENCY APPROVED DATE: 01/24/2025

CONTACT: Josh Nasbe

971-269-4431

josh.d.nasbe@boli.oregon.gov

1800 SW 1st Ave, Suite 500

Portland, OR 97201

Filed By:

Josh Nasbe

Rules Coordinator

NEED FOR THE RULE(S):

These rule amendments are necessary to describe the circumstances when delivery drivers on public works projects are entitled to be paid the prevailing wage, in light of several recent changes to federal law.

JUSTIFICATION OF TEMPORARY FILING:

As a matter of state law, the Bureau has historically enforced federal regulations pertaining to delivery drivers working on public works projects, including projects subject only to state law and projects subject to both state and federal law. ORS 279C.838 requires the Bureau to determine whether delivery drivers, on public works projects subject to state and federal law, are due the prevailing rate of wage in a manner that is consistent with federal law. The applicable federal regulations were recently amended by the United States Department of Labor and portions of those amendments were subsequently enjoined by a federal court.

This fluid federal landscape, with which the Bureau is statutorily required to remain consistent, in conjunction with a rule that fails to articulate a standard for projects subject to both state and federal law, has created serious prejudice to public agencies, bidders and workers on these projects. In light of the cascading consequences of a rapidly evolving federal landscape, these rule amendments are necessary to ensure the viability of public works projects is not impaired and to prevent entry into contractual agreements that do not conform to the law. In the absence of these rule amendments, bidders and public bodies may enter into contractual agreements that do not reflect the true cost of a public works project, jeopardizing the viability of the projects and the ability of successful bidders to complete them.

The adoption of these temporary rules will mitigate these consequences by expressly applying federal law to projects subject to state and federal law, and by articulating a separate standard applicable to projects solely subject to state law. These rule amendments will provide public agencies and bidders with the guidance necessary to enter into contracts that conform to the law and results in workers being paid what the law requires.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

The Department of Labor's explanation concerning amendments to the federal regulations, and the subsequent

litigation, is available here: <https://www.dol.gov/agencies/whd/government-contracts/construction/rulemaking-davis-bacon>

AMEND: 839-025-0035

RULE SUMMARY: Amends rule to describe when workers transporting materials and supplies to and from the site of a public works project are entitled to be paid the prevailing wage.

CHANGES TO RULE:

839-025-0035

Payment of Prevailing Rate of Wage ¶¶

- (1) Every contractor or subcontractor employing workers on a public works project must pay to such workers no less than the applicable prevailing rate of wage for each trade or occupation, as determined by the commissioner, in which the workers are employed. Additionally, all wages due and owing to the workers shall be paid on the regular payday established and maintained under ORS 652.120.¶¶
- (2) When a public works project is subject to the Davis-Bacon Act (40 U.S.C. 3141 et seq.), if the state prevailing rate of wage is higher than the federal prevailing rate of wage, the contractor and every subcontractor on the project shall pay no less than the state prevailing rate of wage as determined under ORS 279C.815.¶¶
- (3) Every person paid by a contractor or subcontractor in any manner who is performing work subject to the prevailing wage on a public works project must receive no less than the applicable prevailing rate of wage, regardless of any contractual relationship alleged to exist. Thus, for example, if partners are themselves performing the duties of a worker, the partners must receive no less than the prevailing rate of wage for the hours they are so engaged.¶¶
- (4) ~~PA~~ persons employed on a public works project and who ~~are~~ spending more than 20% of their time during any workweek in performing duties which are manual or physical in nature as opposed to mental or managerial in nature ~~are~~ a workers and must be paid no less than the applicable prevailing rate of wage. Mental or managerial duties include, but are not limited to, administrative, executive, professional, supervisory or clerical duties.¶¶
- (5) ~~PA~~ persons employed on a public works project for the manufacture or furnishing of materials, articles, supplies or equipment (whether or not a public agency acquires title to such materials, articles, supplies or equipment during the course of the manufacture or furnishing, or owns the materials from which they are manufactured or furnished) ~~are~~ not a workers required to be paid the applicable prevailing rate of wage unless the employment of ~~such~~ the persons is performed in connection with and at the site of the public works project.¶¶
- (6) ~~(a) Except as provided in ORS 279C.838, persons employed on a public works project who are employed by (3), where federal law is applied, a person who is employed by a commercial supplier of materials or supplies that is not a construction contractor or construction subcontractor on the project, or a person who contracts with a commercial supplier of goods or materials must be paid no less than the applicable~~ or supplies that is not a construction contractor or subcontractor on the project, to transport materials or supplies to or from a public works project is not required to be paid a prevailing rate of wage when the work is performed, provided the person's activities at the "site of work" as that term is defined in OAR 839-025-0004 or when the work is performed are limited to driving, delivering the materials or supplies, or waiting fabrication plants, batch plants, borrow pits, job headquarters, tool yards or other such plor materials or supplies to be loaded or unloaded.¶¶
~~(b) A person who is employed by a commercial supplier of materials or supplies, or who contracets that are dedicated exclusively or nearly so to the public works project.~~¶¶
- (7) ~~Except as provided in ORS 279C.838, persons employed on a public works project with a commercial supplier of materials or supplies, and performs non-delivery-related work on the site of work of a public works project is a worker and must be paid no less than the applicable prevailing rate of wage.~~¶¶
- (7) ~~Except as provided in ORS 279C.838(3), where federal law is applied, a person employed by the~~ a construction contractor or construction subcontractor to transport materials or supplies to or from the ~~a~~ public works project ~~are required to be paid~~ is a worker and must be paid no less than the applicable prevailing wage ~~rate of wage for work performed in connection with the transportation of materials or supplies, unless the person's activities at the "site of work" as that term is defined in OAR 839-025-0004, are limited to driving, delivering the materials or supplies, or waiting for materials or supplies to be loaded or unloaded and the aggregate amount of time spent performing such duties does not exceed two hours in a work day, as that term is defined in OAR 839-025-0050.¶¶~~
- (8) ~~PA~~ persons employed on a public works project for personal services, as that term is defined in ORS 279C.100, as opposed to construction work, ~~are~~ not a workers required to be paid the prevailing rate of wage.¶¶
- (9) Every apprentice, as defined in OAR 839-025-0004, must be paid not less than the appropriate percentage of the applicable journeyman's wage rate and fringe benefits as determined pursuant to ORS 279C.800 to 279C.870.

Any worker on a public works project who is not an apprentice as defined in OAR 839-025-0004, or who is not employed by a registered training agent pursuant to ORS 660.010(10), or who is not working pursuant to the standards of the apprentice's apprenticeship program, must be paid not less than the applicable prevailing rate of wage for the classification of work actually performed. In addition, if the total number of apprentices employed exceeds the ratio permitted in the applicable standards, all apprentices so employed must be paid not less than the applicable journeyman's prevailing wage rate for work actually performed.¶

(10) Every trainee, as defined in OAR 839-025-0004, must be paid not less than the appropriate percentage of the applicable journeyman's wage rate and fringe benefits determined pursuant to ORS 279C.800 to 279C.870. Any worker on a public works project who is not a trainee as defined in OAR 839-025-0004, or who is not employed by a registered training agent pursuant to ORS 660.010, or who is not working pursuant to the standards of the trainee's program, must be paid not less than the applicable prevailing rate of wage for the classification of work actually performed. In addition, if the total number of trainees employed exceeds the ratio permitted in the applicable standards, all trainees so employed must be paid not less than the applicable journeyman's prevailing wage rate for work actually performed.

Statutory/Other Authority: ORS 651.060, ORS 279C.808

Statutes/Other Implemented: ORS 279C.800-279C.870