

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

AB 2705 (Ortega)
Version: March 21, 2024
Hearing Date: June 25, 2024
Fiscal: Yes
Urgency: No
ID

SUBJECT

Labor Commissioner

DIGEST

This bill provides that the Labor Commissioner must file any action on a payment bond for a violation of the prevailing wages law within the timeline required for the Labor Commissioner to serve a civil wage and penalty assessment, as specified.

EXECUTIVE SUMMARY

When a state or local agency completes any construction, repair work, work on a utility, public transportation, or other infrastructure project through the use of public funds, it is considered a “public works” project. Under state law, when a public agency contracts for a public works project, all workers employed by a contractor or subcontractor on the public works project must be paid a prevailing wage for the locality. If the contract for public works contract is for more than \$25,000, the law requires that the contractor must provide the awarding agency a payment bond that protects employees in the case of any non-payment or under-payment of wages. The Labor Commissioner may investigate a claim that a contractor or subcontractor failed to pay an employee the prevailing wage, and if the Commissioner determines there was a violation, the Commissioner must issue an assessment for the wages and penalties for the violation within 18 months of the recording of the notice of completion or the acceptance of the public works project. However, if a worker, or the Labor Commissioner on behalf of a worker, wishes to initiate a claim against the bond for the unpaid wages, they must do so within six months of the completion or acceptance of the project, as specified. This bill aligns these timelines for the Labor Commissioner to bring a claim against the bond, so that the Labor Commissioner may file such a claim within 18 months instead of six. AB 2705 author-sponsored, and is supported by the California-Nevada Conference of Operating Engineers and other worker organizations, and is opposed by the American Subcontractors Association of California, Construction Employers’ Association, and the Western Electrical Contractors Association, Inc., and two other associations. This bill

passed out of the Senate Labor, Public Employment and Retirement Committee on a vote of 5 to 0.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes the Labor Commissioner (Commissioner) within the Department of Industrial Relations (DIR), to enforce, among other things, wage and hour law, anti-retaliation provisions, and employer notice requirements. (Labor Code § 79 et seq.)
- 2) Defines a “public work” as construction, alteration, demolition, installation, or repair work done under contract and paid in part or in whole out of public funds, except for work done directly by a public utility company pursuant to the Public Utilities Commission or other public authority. Includes work done for irrigation, utility, reclamation, improvement districts and other similar districts, street, sewer, or other improvement work, laying of carpet in specified circumstances, tree removal work, and public transportation demonstration projects. (Labor Code § 1720.)
- 3) Requires that, when a public agency contracts for a public works project, except for public works projects of \$1,000 or less, all workers on the public works project must be paid at least a prevailing rate of per diem wages for work of a similar character in the locality in which the public project is performed, including the prevailing rate for any holiday or overtime work. (Labor Code § 1771.)
- 4) Requires the Director of DIR (Director) to determine the general prevailing rate of per diem wages, as specified, and specifies that the director’s determination shall be final, except as specified. (Labor Code § 1770.)
- 5) Requires an awarding agency of a public works project to “take cognizance” of violations of the prevailing wage laws, and permits the agency to withhold contract payments for such violations. (Labor Code § 1726.)
- 6) Specifies that, before an awarding agency makes payments to a contractor of the money due under a public works contract, the agency withhold and retain all amounts required to satisfy any civil wage and penalty assessment issued by the Commissioner for a prevailing wage violation. (Labor Code § 1727.)
- 7) Requires the Commissioner to, with reasonable promptness, issue a civil wage and penalty assessment to the contractor or subcontractor, or both, if the Commissioner or their designee determines after an investigation that there has been a violation of public works laws. Specifies that interest shall accrue for any due and unpaid wages from the time the wages were due and payable. (Labor Code § 1741 (a).)

- 8) States that the Commissioner's assessment must be served not later than 18 months after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 18 months after the acceptance of the public work, whichever occurs last. Specifies that the Commissioner must, to the extent practicable, ascertain the identity of any bonding company that issued a bond to secure the payment of wages covered by the assessment and any surety on a bond, and that the Commissioner shall serve a copy of the assessment on the bonding company or surety at the same time that notice is made on the contractor or subcontractor. (Labor Code § 1741 (a).)
- 9) Requires the period of service of assessments to be tolled for the period of time required by the Director of DIR to determine whether a project is a public work, as specified. Requires the body awarding the contract for a public work to furnish, within 10 days after receipt of a written request from the Commissioner, a copy of the valid notice of completion for the public work, as described. (Labor Code §§ 1741.1 (a) and (b)(1).)
- 10) An affected contractor or subcontractor may request a review of a civil wage and penalty assessment and withholding to the Commissioner, if requested within 60 days after they are served with the notice of the assessment. Upon the contractor's request, provides for a hearing before an impartial hearing officer within 90 days, at which the contractor will have the burden of proving that the basis for the civil wage and penalty assessment was incorrect. Within 45 days of the conclusion of the hearing, the Director must issue a written decision regarding the assessment. An affected contractor or subcontractor may obtain review of this decision by filing a petition for a writ of mandate to the appropriate superior court. (Labor Code § 1742.)
- 11) Requires the contractor and sub-contractor to be jointly and severally liable for all amounts due pursuant to a final order or a judgment thereon. Requires the Commissioner to first exhaust all reasonable remedies to collect the amount due from the sub-contractor before pursuing the claim against the contractor. (Labor Code § 1743 (a).)
- 12) Requires, from the amount collected, the wage claim to be satisfied prior to the amount being applied to penalties. If insufficient money is recovered to pay each worker in full, requires the money to be prorated among all workers. (Labor Code § 1743 (b).)
- 13) Provides that a joint labor-management committee, as established under federal law, may bring an action against an employer for a failure to pay a prevailing wage to its employees within 18 months after the filing of a valid notice of completion, or within 18 months after the acceptance of the public work, whichever occurs last. A court must award restitution to an employee for unpaid wages, plus interest, and

liquidated damages equal to the amount of unpaid wages owed, and may impose civil penalties, injunctive relief, or any other appropriate form of equitable relief. (Labor Code § 1771.2.)

- 14) Requires that a direct contractor awarded a public works contract involving an expenditure of more than \$25,000 must give a payment bond to the awarding entity before the commencement of the work. (Civ. Code § 9550.)
- 15) Requires that a payment bond must be for an amount not less than 100% of the total amount payable pursuant to the public works contract, and specifies that the surety will pay the obligation and a reasonable attorney's fee if a contractor or subcontractor fails to pay specified required wages under the public works laws. (Civ. Code § 9554.)
- 16) Provides that a laborer, a person that provides work for a public works contract, and a hazardous waste hauler, as specified, who has not been paid in full may give a stop payment notice to the public entity completing the public works project, or assert a claim against a payment bond on a public works project. (Civ. Code § 9100.)
- 17) Authorizes, in public works of improvement, a claimant to commence an action to enforce the liability on the bond at any time after the claimant ceases to provide work, but no later than six months after the period in which a stop payment notice may be given. (Civ. Code §9558.)
- 18) Provides that a stop payment notice is not effective unless given before the expiration of either:
 - a) 30 days of the recording of a notice of completion, acceptance, or cessation; or
 - b) 90 days after cessation or completion of work if no notice of completion, acceptance, or cessation is recorded. (Civ. Code § 9356.)

This bill:

Specifies that, notwithstanding Civil Code Section 9558, the limitations period for any action on a payment bond filed by the Commissioner shall be governed by the limitations period in Labor Code Section 1741 and the tolling provisions of Labor Code Section 1741.1.

COMMENTS

1. Author's statement

According to the author:

AB 2705 will assist the Labor Commissioner in combatting wage theft on public works projects by correcting an inconsistency in public works law. The bill

would align the statute of limitations for the Labor Commissioner to assess penalties for prevailing wage violations – currently 18 months-- with the statute of limitations to sue the bonding company that bonded the project – currently 6 months. By providing that the statute of limitations for suing the bonding company is the same as for assessing penalties on unscrupulous employers, this measure will give the Labor Commissioner the time they need to recover wages from the bonding company and return them to the workers.

2. California’s protections for workers’ wages in public works projects

Many of California’s labor laws aim to protect the state’s workers and ensure they are paid fairly and adequately for their work. These laws are of significant importance, as they ensure that workers can meet their basic needs and protect their right to just compensation for their labor. However, wage theft, in which an employer does not pay a worker the amount the worker is due, or does not pay the worker for all of their working hours, is the largest form of theft in the nation.¹ Reports state that workers lost at least 338 million dollars to wage theft in 2021, and one of the top industries for wage theft was construction.² The Labor Commissioner (Commissioner), who is charged with investigating complaints of violations of prevailing wage and apprenticeship laws that protect the wages of workers on public works projects, opened 1,964 cases of prevailing wage violations and assessed over \$10.6 million in prevailing wage assessments and another \$12.6 million in penalties against employers for violations.³

When a state or local agency completes any construction, demolition, installation, alteration, or repair work, or work on any irrigation, utility, or street, sewer, public transportation, or other infrastructure project through the use of public funds, it is considered a “public works” project. (Labor Code § 1720.) When a California state or local agency initiates a public works project, the agency often lacks the staff and expertise to carry out the project itself. Instead, it turns to contractors to which it awards funds and a contract to complete the project for the agency. Under state law, when a public agency contracts for a public works project, all workers employed on the public works project must be paid a prevailing wage for the locality, as determined by the Director of DIR. (Labor Code § 1771.) Furthermore, in any call for bids for a public works contract, as well as in the final contract for the contracted-for work, the agency must specify the prevailing wage rate for each type of worker needed for the project, or otherwise make the rate available upon request. (Labor Code § 1773.2.) The prevailing

¹ Brady Meixell & Ross Eisenbrey, Wage theft is a much bigger problem than other forms of theft – but workers remain mostly unprotected, Economic Policy Institute (Sept. 18, 2014), available at <https://www.epi.org/publication/wage-theft-bigger-problem-forms-theft-workers/>.

² Alejandro Lazo et al, When employers steal wages from workers, CalMatters (Jul. 25, 2022), available at <https://calmatters.org/explainers/when-employers-steal-wages-from-workers/?series=unpaid-wages-california-workers>.

³ Cal. Labor Commissioner’s Office, 2020-2021 *The Bureau of Field Enforcement Fiscal Year Report*, Dept. of Industrial Relations (2021), available at <https://www.dir.ca.gov/dlse/DLSEReports.htm>.

wage is based on the standard wages for a particular work or position, and is often based on the rate in local collective bargaining agreements. The function of prevailing wage laws is to ensure that a contractor's ability to obtain a public works contract is not based on paying lower wage rates than competing bidders. Thus, all bidders on a public works project are required to use the same wage rates when bidding for a public works project, and contractors cannot squeeze their employees or rely on non-unionized workers in order to outbid another contractor for the project.

When a contract for a public works project has been awarded, the awarding agency must ensure that a prevailing wage is paid by the contractor or subcontractor. An awarding agency is supposed to "take cognizance" of a violation of the prevailing wage and public works laws and promptly report any suspected violations to the Commission. (Labor Code § 1726.) If the contractor has not paid a prevailing wage, the awarding agency is empowered to withhold contract payments until the violations are resolved. (Labor Code §§ 1726, 1771.6.) The Commissioner can also investigate and determine whether there has been a violation of the prevailing wage laws. If the Commissioner's investigation determines there has been a violation, the Commissioner must with reasonable promptness issue an assessment of the wages and civil penalty stating the wages, penalties, and forfeitures due. (Labor Code § 1741.) The law provides the Commissioner 18 months from the completion of the public works project (when a notice of completion for the project is recorded, or upon acceptance by the awarding agency of the public work) to serve the assessment on the project's contractor or subcontractor. (Labor Code § 1741.) This timeline may additionally be tolled if DIR must investigate whether the project is in fact a public works project. (Labor Code § 1741.1.) A contractor may request review of the withholding and any assessment of penalties within 60 days after receiving the notice, and such review would then be conducted within 90 days at a hearing before an impartial hearing officer. (Labor Code § 1742.)

There are also two additional ways in which the law ensures that individual workers entitled to a prevailing wage receive what they are owed. One is through a stop payment notice, and one is through a payment bond. A claimant worker who is not paid their prevailing wage may issue a stop payment notice to the public agency that awarded the public works contract stating the work performed and the amount of wages unpaid. (Civ. Code § 9352.) Upon receiving a stop payment notice, the public agency must withhold from any undisbursed funds under the contract with the violating contractor sufficient funds to pay the claim in the stop payment notice. (Civ. Code § 9358.) The claimant worker then has a limited amount of time to file an action in court to recover the withheld funds. However, under a stop payment notice, it may still be difficult for an aggrieved worker to recover what they were owed, as the contract fees may already have been disbursed, or may not be sufficient to cover the wages owed, when the worker brings a stop payment notice. If the contractor does not have sufficient assets to cover what is owed or goes into bankruptcy, it may be difficult for a worker to obtain any owed wages at all if the stop payment notice is insufficient.

Thus, public works projects may guarantee that a worker on the project can recover what they are owed through a performance bond. In fact, if the contract for public works project is for more than \$25,000, the law requires that the contractor must provide the awarding agency a payment bond that protects subcontractors and employees in the case of any non-payment or under-payment of wages. (Civ. Code § 9550.) The contractor pays the payment bond to guarantee the wages and payment required under the public works contract, such that a claimant may claim what they were owed from the surety of the bond if the contractor does not pay the wages to which a worker is entitled. A laborer or worker under a contractor of a public works project may assert a claim against the bond and notify the public agency directing the public works project of the alleged failure by the contractor to pay prevailing wages. (Civ. Code § 9100.) However, when such a laborer or worker wishes to bring a claim to enforce the bond and receive what they were due to be paid under the contract, they have no later than six months after either of the following: 30 days after the recording of a notice of completion, cessation, or acceptance; or 90 days after the cessation or completion of the worker's work if no notice is recorded. (Labor Code §§ 9558; 9356.) A worker may pursue a stop payment notice and a claim against the bond at the same time, and can pursue either independently of the other. (Labor Code § 9564.) These remedies can be brought by the Commissioner on the worker's behalf.

3. AB 2705 aims to remedy the mismatch between the Commissioner's deadline for determining fines and penalties for prevailing wages violations and the statute of limitations for a worker to enforce a claim against the performance bond

The timeline for a worker to bring a lawsuit to enforce the performance bond is significantly shorter than the timeline provided the Commissioner for issuing an assessment. Labor Code Section 1741 provides the Commissioner 18 months from the recording of a notice of completion, acceptance, or cessation, or 18 months from the cessation of work, whichever is later, to issue a civil wage and penalty assessment after the Commissioner's investigation. However, a worker must bring a suit to enforce the bond within six months of the deadlines specified for filing a stop payment notice. Since this deadline is either 30 days after the recording of the notice of completion, cessation, or acceptance, or 90 days after the cessation or completion of work, the maximum amount of time the worker has to file their claim is nine months after the cessation or completion of work. That is half the amount of time provided to the Commissioner for issuing an assessment. This is relevant because the time for filing a claim against the bond may run out before the Commissioner has completed their investigation and issued an assessment.

AB 2705 attempts to align the timelines for the Commissioner's assessments and a worker's cause of action to enforce the bond. It specifies that, notwithstanding the six month limitation in Section 9558 of the Civil Code, any action on a payment bond filed by the Commissioner must be filed within the limitations periods described in Labor

Code Section 1741 and 1741.1 for the serving of a civil wage and penalties assessment. Thus, for the purposes of a civil action against the performance bond that is brought by the Commissioner, the statute of limitations to file the civil action would be the same 18 months, not the current six months. Notably, AB 2705 does not change Civil Code Section 9558, so any claimant not represented by the Commissioner would still have to follow the six month limitation. Nonetheless, AB 2705 would ensure that, if after an investigation the Commissioner makes an assessment of wages due, and the contractor does not have the assets to cover what is due and the awarding agency did not withhold sufficient funds to cover the amount due, the Commissioner could still recover what is due the worker through the performance bond. Thus, AB 2705's change will ensure that recovery through the performance bond is still an option when the Commissioner has made a civil wage and penalty assessment against the contractor. Since the purpose of the performance bond is to guarantee that workers under the contract will be paid a prevailing wage, aligning these timelines makes sense as a matter of public policy.

4. Arguments in support

According to the California State Pipe Trades Council, the California State Association of Electrical Workers, and the Western States Council of Sheet Metal Workers, which are in support of AB 2705:

As it stands, the discrepancy in statute of limitations between the determination of fines and penalties by the Labor Commissioner (18 months) and the timeframe for suing the bonding company responsible for the project (6 months) poses a significant risk to workers' rights and fair compensation. This incongruity could potentially result in workers being denied their rightful wages due to procedural limitations rather than any fault of their own.

AB 2705 proposes a simple yet crucial fix to this issue by aligning both statutes of limitations to 18 months. This ensures that the Labor Commissioner has adequate time to complete assessments and pursue legal action against bonding companies, thus safeguarding workers from unjust wage losses.

It is imperative that our laws prioritize the protection of workers' rights and ensure fair compensation for their labor. AB 2705 represents a necessary step towards achieving this goal and rectifying an unintentional inconsistency in the law.

5. Arguments in opposition

According to the Construction Employers' Association, which is opposed to AB 2705:

When taken in concert with AB 2135 (Schiavo), this measure will extend the time period to make a demand on a public works payment bond from 6 months to 42 months. Considering the Legislature's interest in increasing diversity in public contracting, this measure will have the opposite effect by making it more difficult and costly for small and emerging contractors and subcontractors to obtain payment bonds.

As you know, prime contractors are jointly and severally liable for wage claims by every worker on the jobsite. This means that if DIR is unable to recover wages from the actual employer who violated the law, DIR may recover any amounts due workers from the prime contractor. Do we know if and how often DIR is attempting to collect outstanding wages from prime contractors when they are unable to collect from the employer who violated the law? Do we know if DIR is having difficulty collecting from prime contractors? Do we know what percent of collections, if any, are paid by payment bonds? Frankly, proponents of AB 2135 have failed to answer the same questions. It is worth noting that according to the most recent Bureau Field Enforcement Report, DIR collected approximately 85% of all wages due employees on public works projects; out of \$10,979,508.51 assessed, DIR collected \$9,228,127.24. Consequently, what problem is this measure attempting to solve, and is the solution potentially more detrimental than the problem?

The afore-mentioned information is importation because payment bonds are not like typical insurance policies. Instead, the principal on the bond is ultimately responsible for indemnifying the surety, so were a bond to pay a claim, the principal would have to repay the bonding company, on top of the premiums they pay for the bond. For large contractors and subcontractors with adequate bonding capacity, the fiscal impact of this bill will likely be minimal. For medium and small contractors and subcontractors, including minority owned and DVBES, the increased costs may be significant, and the availability of bonds may decrease due to the increased duration of liability.

SUPPORT

California-Nevada Conference of Operating Engineers
California State Association of Electrical Workers
California State Pipe Trades Council
International Union of Operating Engineers, Cal-Nevada Conference
State Building and Construction Trades Council
Western States Council of Sheet Metal Workers

OPPOSITION

American Subcontractors Association-California

California Association of Sheet Metal & Air Conditioning Contractors National Association
Construction Employers' Association
Southern California Contractors Association
Western Electrical Contractors Association INC.

RELATED LEGISLATION

Pending Legislation:

AB 2182 (Haney, 2024) provides that, among other provisions, if a contractor or subcontractor appeals a Commissioner's civil wage and penalty assessment and does not appear at a prehearing or hearing for which they received notice, DIR may dismiss their appeal. Provides that DIR may reconsider the dismissal upon a showing of good cause within 15 days of the issuance of the dismissal. AB 2182 is currently in this Committee.

AB 2135 (Schiavo, 2024) increases the timeline for when the Commissioner must serve a civil wage and penalty assessment upon a contractor or subcontractor of a prevailing wage violation from 18 months to 24 months after the later of the filing of a valid notice of completion or after the acceptance of the public work. Provides that this time period may be extended by 18 months for good cause. AB 2135 is currently in this Committee.

Prior Legislation:

AB 1336 (Frazier, Ch. 792, Stats. 2013) increased the timeline for when the Commissioner must serve a civil wage and penalty assessment upon a contractor or subcontractor of a prevailing wage violation from 180 days to 18 months after the later of the filing of a valid notice of completion or after the acceptance of the public work.

AB 1646 (Committee on Labor and Employment, Ch. 954, Stats. 2000) established the authority of the Commissioner to assess a civil wage and penalty against a contractor or subcontractor who fails to pay the prevailing wage.

PRIOR VOTES:

Senate Labor, Public Employment and Retirement (Ayes 5, Noes 0)

Assembly Floor (Ayes 69, Noes 0)

Assembly Appropriations Committee (Ayes 14, Noes 0)

Assembly Judiciary Committee (Ayes 11, Noes 1)

Assembly Labor and Employment Committee (Ayes 7, Noes 0)
