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Legislature Repeals Michigan Prevailing Wage Rate Law

6.11.2018

Overview

With the construction season already underway, the Michigan legislature repealed the state Prevailing Wage Law. The repeal was effective as of June 6, 2018. This change in the law may lead to many questions for construction industry employers and governmental entities in Michigan that have a contract in place requiring compliance with Michigan's Prevailing Wage Law. *Is the contract enforceable even though the law no longer exists? Should the parties renegotiate the contract to eliminate the requirement that the contractor comply with the law? Can a contractor simply ignore the contractual requirement?*

Background

State "prevailing wage laws" require private contractors bidding for state or local public works projects, or private projects that are financed in part by public funds, to provide at least a minimum package of wages and benefits to their workers. Michigan's Prevailing Wage law covered skilled and unskilled mechanics, laborers, workers, helpers, assistants, and apprentices working on a state project involving new construction, alteration, repair, installation, painting, decorating, completion, demolition, conditioning, reconditioning, or improvement of public buildings, schools, works, bridges, highways, or roads authorized by a Contracting Agent. A Contracting Agent included any officer, school board, board or commission of the state, or a state institution supported in whole or in part by state funds if they were authorized to enter into a contract for a state project. Contracts that require the payment of rates established by the federal Davis Bacon Act (generally, federally funded projects) were not subject to the Michigan Prevailing Wage law, and are not affected by the repeal.

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The Michigan Department of Licensing and Regulatory Affairs (“LARA”) was required to determine the prevailing wage and fringe benefit rates in the collective bargaining agreements within each subsection of the construction industry. The Contracting Agents for the state and local governments (which include counties, cities, villages, townships, and school districts), then applied the established prevailing rates for their area when soliciting bids and negotiating contracts for construction projects financed or financially supported by the state.

Impact of Repeal of Michigan’s Prevailing Wage Law

The initiative to repeal the Prevailing Wage law did not include any transitional rules or phase-out period. The law was repealed in full, without further guidance. In contrast, when the Indiana General Assembly repealed the Indiana Common Construction Wage Act (Indiana's Prevailing Wage Law) in 2015, the legislature expressly required contractors working on covered construction projects awarded prior to the repeal date to continue to comply with the law as it existed prior to the repeal, and to pay workers at or above the established wage and fringe benefit rates for the duration of the project.

Absent transitional rules, what should the parties to existing construction contract containing Michigan Prevailing Wage law requirements do?

While each contract is different and may contain different language and specific requirements intended to ensure compliance with the Michigan Prevailing Wage law, the general answer is fairly clear in most cases: Continue to pay wages and fringes just as if the repeal did not occur, until the contract no longer applies. If the parties to the contract do otherwise, the competitive bidding process by which the contract was awarded could be argued to have been contaminated, and thereby the process by which the contract was awarded could be called into question retroactively. Changing the contract’s wage and benefit terms would change the terms under which the contract was initially priced and formed. Without consulting with knowledgeable legal counsel first, it would not be safe to assume that this change in the law frees the parties to reform the contract outside of the competitive bidding process.

Governmental construction contracts awarded after June 6, 2018, should not contain provisions referring to, or designed to comply with, Michigan’s Prevailing Wage law. Moreover, construction contractors should retain legal counsel to review the terms of their performance any payment bonds for any governmental construction projects in Michigan.

Additionally, before changing the composition of their wage and benefit package for non-union construction industry employees, employers should keep in mind the following:

- State and local minimum wage and overtime laws still apply, so reducing wages, overtime provisions, or premium pay could violate another law;
- Prevailing Wage law requirements adopted by local governments are unaffected by the repeal of the state Prevailing Wage law;

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- The Affordable Care Act imposes tax penalties on applicable large employers that fail to adequately subsidize the group health coverage offered to full-time employees and their dependents, so reducing the employer's share of health premiums and/or reducing wages could trigger excise taxes; and
- Tax-qualified retirement plans are subject to nondiscrimination rules, so reducing employer contributions to retirement plans for non-union employees could cause the retirement plan to fail nondiscrimination testing, which can be costly to correct.

Both construction industry employers and contracting state and local entities should proceed with caution when reacting to the repeal of Michigan's Prevailing Wage law. As always, construction contracts should be reviewed by competent legal counsel with experience in the construction industry.

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