

**A SUMMARY AND CRITIQUE OF OREGON
BOLI'S 1997-8 CONSTRUCTION INDUSTRY
OCCUPATIONAL WAGE SURVEY**

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I. OREGON'S PREVAILING WAGE LAW

Oregon's Prevailing Wage Act is set forth at ORS 279.348 et seq. The purpose of the Act, among other things, is to maintain "community established compensation standards" and "recognize that local participation in publicly financed construction and family wage income are essential to the protection of community standards." ORS 279.349(1) and (2). The Act requires that the commissioner of the Bureau of Labor and Industries (BOLI) determine the prevailing wage paid in each of 14 statutorily defined "localities" "in the same trade or occupation." The survey is to be conducted on an annual basis.

The current version of the Act is of recent origin. In 1994 a coalition of conservative business groups led by the Oregon Farm Bureau attempted to procure the repeal the Act by initiative. This effort was soundly defeated by the electorate in the November 1994 elections. Subsequently, Republicans took control of both houses of the Oregon legislature and captured the elected position of BOLI commissioner as well. The result was a revision of the previous version of the law to require, inter alia, that BOLI conduct its own wage survey annually instead of relying on the federal survey, which in the Republican view tended to favor unions. The Republican leadership in the legislature clearly anticipated that the new law would adversely affect unions.

In due course the new provisions of the Act were implemented by the new Commissioner. The result was highly controversial, and a number of major issues surfaced. What follows is a review of the most significant of these issues.

II. OVERSIGHT AND THE ISSUE OF SECRECY

Having been presented with the revised statute and the obligation to do an annual survey (the results of which were supposed to show some gains for the Republican sponsors of the legislation), the Commissioner had the task of carving out areas of discretion which would allow him to mold the surveying and wage determination processes into a politically acceptable product.

Three issues of oversight arose during the first year's process. The first related to the Commissioner's use of the statutorily mandated Advisory Committee; the second related to the hiring of an independent firm to oversee the survey process and the

conversion of the raw data into prevailing wages by region; while the third related to the cloak of secrecy which has enveloped critical aspects of the wage determination process.

Advisory Committee The Commissioner appoints the Prevailing Wage Advisory Committee whose task it is to advise the Commissioner on issues relating to the Act. Membership on the Committee is balanced between union and industry representatives, with the industry representatives balanced between union and non-union companies.

The critical issue from the beginning was whether the Committee would have a significant role in the choice of methodology adopted by the Commissioner for the survey and for the conversion of the data from the survey into actual rates. After an initial misstep (where a proposed methodology was thrown out under heavy fire from the Committee), the Committee's role became largely nominal, with no significant input in the determination of wage rates. The result of this move on the part of the Commissioner has been to increase his area of discretion.

Oversight Contractor The Commissioner has chosen to contract the annual BOLI survey out to the Oregon Employment Department (OED). Following long established USDOL practice, both the first and second contracts between BOLI and OED provided that an independent contractor would be hired to review the collection of the raw data and the process of arriving at actual wage rates from it. Over substantial objections, the Commissioner decided in both cases not to hire the oversight contractor and to do the actual determination of wage rates in his office without review.

Confidentiality of Data The choice of the Oregon Employment Department as contractor for the data collection part of the survey meant that OED's secrecy policy would apply and that all the data collected would be secret and outside the reach of Oregon's Open Records Act. The situation has deteriorated to the point where the Employment Department will neither provide raw survey data for review, nor--at least as of this writing--even the aggregated survey data.

The result is that the universe of firms to be surveyed is confidential; the data collection process is confidential; the conversion of raw data to aggregate survey data is confidential; and the aggregate survey data itself is confidential.¹ Moreover, to the extent that the aggregate survey data is confidential, it will be impossible to determine the methodology or principles used by the Commissioner to convert the aggregate data by

¹ Last year the Employment Department was prevailed upon in the end to release the aggregate data. This year they have reversed their reluctant agreement of last year and now refuse to release this data.

locality and occupation into wage rates, a matter of pivotal concern, as discussed below. The effect of this is to create an information monopoly, thereby eliminating effective review and maximizing discretion in the hands of the Commissioner.

III. CONTROVERSIES IN THE DESIGN OF THE SURVEY

Policy choices by the Commissioner in the design of the survey have had a significant impact on the results. These included the choice of survey window, the exclusion of out-of-state contractors working in Oregon, and the barring of owner operators from the survey.

Choice of Survey Window A major issue in prevailing wage surveys involves the choice of time period to be surveyed. The USDOL procedure is to survey projects begun at any time in a one year period, with all hours worked by occupation collected. BOLI's approach is to survey for a single "peak week." For the 1997 survey the window was the week of July 13th unless this was not a "peak week," in which case the one week window could be shifted to another single week between June 15th and August 3d.

The problem with this is that it tends to over-emphasize construction trades working in mid-summer and de-emphasizes those--for instance finish carpenters, which tend to work in the fall. This choice also tends to emphasize smaller contractors working on small contracts, compared to large contractors with steadier work.

Exclusion of Out-of-State Contractors Since the universe of firms to be included in the survey is confidential, it took a fair amount of time and a good deal of research to determine that the Employment Department's survey population did not include the significant number of out-of-state contractors that work in Oregon.² This error further reduced the already limited hours produced by the survey.

Owner-Operators BOLI from the beginning excluded owner-operators of trucks, because it didn't want to have to deal with the problem of separating the return to ownership of the truck from the wage component of compensation. This was and is a particularly serious problem for Teamsters, since many of their members are owner-operators.

² This population is comparatively large because the Portland metropolitan area is just across the river from Vancouver, Washington, and Boise, Idaho is the nearest metropolitan area to much of northeastern Oregon.

The Adequacy-of-Data Problem The significance of each of the three problems just described is magnified because of BOLI's capriciously applied "rule" with respect to the data necessary to "entitle" a region or an occupation to a wage rate determination. Limiting the window not only has a differential impact on *which* crafts are surveyed, but also sharply limits the number of hours of wage data collected. Eliminating out-of-state contractors again limits the number of hours collected. Excluding owner operators sharply reduces the number of Teamster hours in the survey, especially on a region by region basis.

This adequacy-of-data problem has become the justification for the current problem of overriding importance, the Commissioner's claim that lack of adequate data entitles him to ignore the statutory mandate to set rates by craft and locality and substitute his own unrestricted discretion.

IV. ARRIVING AT RATES: THE COMBINATIONS PROBLEM

The purpose of prevailing wage legislation is to maintain community wage rates on a geographic basis by craft. As described above, the Act in Oregon, like little Davis-Bacon Acts in most other states, requires that wage rates be established by locality and by "trade or occupation." The problem here is that the Commissioner has adopted a survey methodology that samples only a very small portion of the total number of hours worked on otherwise qualifying construction projects. This means that especially for small crafts and particularly in non-metropolitan counties, there often will be only limited data available by craft and subcraft.

The Commissioner has taken advantage of this limited data problem created by his choice of survey methodology to assert a prerogative to combine regions, crafts, and subcrafts on an ad hoc basis when data is, in his view, inadequate. This has resulted in the averaging of crafts and subcrafts with substantially different wage rates, and the averaging of substantially divergent wage rates for the same craft from different localities. This averaging has resulted in substantial windfalls for workers in some areas and substantial losses for high wage workers in others.

Moreover, there is no "system" to the Commissioner's choice of combinations. As he has conceded, he takes the data into his conference room and makes up the system of combinations--which rates prevail and which don't, which crafts are combined with which others, which localities are averaged together, whether work will be broken out by Building/Heavy/Highway construction types by region and craft--based solely on what seems good to him at the time. Nor has he provided an explanation of his choices after the fact.

In essence, a process which is supposed to be a technical exercise to determine the actual prevailing wage rates by community and craft has become an almost purely discretionary decision by the Commissioner alone.

V. ILLUSTRATIONS

Several examples will illustrate the issues described above.

Occupations The Employment Department surveyed and received data for 112 crafts. The Commissioner in the end collapsed these 112 crafts down to 57, eliminating one out of every two.

Elimination of Subcrafts Subcraft distinctions were averaged away for a number of occupations. Two examples among many are laborers and truck drivers. Laborers subcrafts are divided into five Groups, with base wages running from an hourly rate of \$16.55 for Group 5 flaggers to \$19.30 per hour for highly skilled Group 4 workers. The wages of all subgroups, though surveyed and available, were averaged to arrive at a single craft rate, which was then promulgated.

The same was done for truck drivers, averaging the rates for Group 7 drivers of 100 cubic yard belly dumps with the rates for Group 1 pilot car drivers. The result is to destroy the gains of unionization and diminish the incentive to skill enhancement, contrary to one specific purpose of the Act. ORS 279.349(3).

On the other hand, BOLI decided to combine some carpenter subcrafts from different Groups, while establishing individual rates for others, and simply refusing to set a rate for another surveyed subcraft with significant positive hours.

Combination of Regions Consider the example of truck drivers. Truck drivers were one of three occupations which were broken out by Building, Heavy and Highway ("BHH"). These three categories multiplied by 14 statutory localities reflects the need to establish 42 prevailing wage rates. However, "limited data" resulting from defective survey design resulted in the establishment of specific locality rates in only 10 of 42 cases (5 non-union and 5 union); in the remaining 32 cases (76 percent) rates were established based on multi-locality averaging. This produces bizarre results.

For example, in District 6 the prevailing rate of \$13.84 for Building is \$5.16 per hour less than the weighted average wage in the locality. Three and four dollar differences are common between the prevailed wage and the weighted average wages for

each locality by BHH.

In District 9 the Heavy rate was determined based on 95 percent of the hours being union. The lowest union wage shown for Truck Drivers in the BOLI book appendices is \$20.32 for a Group 1 driver with no zone pay. Even assuming that every one of the union hours were at this lowest union rate with no zone pay, the other 5 percent of the hours would have had to average a *negative* \$129.02 to have the weighted average come out at \$12.82.

Even with laborers, the Commissioner only set locality specific rates in 4 (non-union) cases and 14 union cases, for a total of only 18 out of 42 cases. In 57 percent of the cases locality specific rates were not established.

This unwillingness to establish rates in localities based on wage rates actually prevailing in those localities results in the destruction of the local wage patterns the Act was meant to preserve. In many cases wages are set several dollars an hour lower than the wages actually prevailing, while in others contractors are forced to pay newly prevailed wages several dollars an hours higher than those customary in their locality.

Moreover, and perhaps more to the point, windfall gains are given to largely non-union workers in the those localities in the group of averaged localities where wages are low, and rates are arbitrarily reduced for higher wage--largely unionized-- workers in the higher wage localities. Thus the result of the policy is to reward non-union workers and penalize union workers.

Averaging Together of Dissimilar Crafts Due to the contrived shortage of data described above, and much to the detriment of the laborer occupations, BOLI included the separately surveyed non-laborer landscape technicians into the laborer's determination. This was done notwithstanding the fact that landscape technician wages with fringes average under \$15 per hour while the laborer occupations average over \$20.

This combination of crafts was done arbitrarily and inconsistently. There are over 8,900 hours statewide in the landscape technician occupation, and there is no reason at all that landscape technicians could not have stood independently. By comparison, BOLI established prevailing wages for a number of other occupations with far fewer statewide hours, for example, Boilermakers with only 2,100 hours, Bricklayers with 8,290 hours, Asbestos Workers/Insulators with 4,136 hours, and Acoustical Carpenters with 2,107 hours, just to name a few out of a long list.

VI. THE DOWNWARD SPIRAL

Prevailing wage rates are expected to have an impact on public contracts, just as the rates in public contracts will have an impact on the setting of prevailing wage rates through the subsequent survey process. If prevailing wage rates are suddenly lowered, then this will be reflected in the next round of public contracts, other things equal. Construction firms working on these public contracts will then lower wage rates where feasible.³ These lower rates will then be surveyed the next time around, and will thus have a further negative affect on the prevailing wages.

Because of this self-reinforcing interaction, it is important that prevailing wage rates be determined properly at the outset. Otherwise, not only will there be short term losses, but also, and not least, future wages will be subject to a negative downward spiral, as incorrectly determined current wages are picked up and compounded in subsequent year's surveys.

VII. SUMMARY

The Oregon Prevailing Wage Act explicitly requires the Commissioner to establish wage rates by trade or occupation in each of the 14 localities set forth in the statute. A statistically valid process for surveying the number of hours necessary to produce a statistically valid estimate for each trade and locality would be easy to design and administer.

Instead the Commissioner has adopted a process that is designed to collect no more than one week's data from each firm surveyed. The result, according to the Commissioner, is that this produces too few hours to determine wages for all crafts in all locations. Moreover, BOLI requires that the one week's data must be collected from a particular week if possible, or at least from a narrow period from early to mid-summer. This tends to minimize hours for trades that traditionally peak in the fall, and thus further reduces hours.

This approach produces a shortage of data, which is then used as a justification by the Commissioner to combine and average localities, crafts and subcrafts, in ways that tend to create windfall gains for non-union workers and windfall losses for union workers. The power to do this gives the Commissioner the power to prefer some unions over others, thereby exacerbating the normal conflicts of inter-union politicking. It also gives a commissioner so inclined the scope to aggrandize the anti-union political agenda

³ Many collective bargaining agreements have provisions which allow the adjustment of wage rates as prevailing wages change.

of right wing elements in the legislature.

All of this is out of accord with the statute. The Act requires the setting of wage rates for each of 14 localities by "trade or occupation." ORS 279.348(1) and (2). This should involve no more than a straightforward technical exercise in surveying and statistical compilation. The statute requires oversight by the PW Advisory Committee, this is ineffective. Outside oversight of the numerical portion of the wage determination process is possible, but in practice is hamstrung by the BOLI/OED declaration that more and more of the data is secret, even the aggregate survey data. The Commissioner himself has conceded that he has no fixed system for arriving at prevailing wage rates. He claims the discretion to set the wages as he sees fit, and his ad hoc system of combinations and aggregations is the method he has adopted.

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