

ORIGINAL

IN THE
SUPREME COURT OF OHIO

DOUG BERGMAN, ET AL.

Plaintiffs-Appellants,

v.

**MONARCH CONSTRUCTION
CO.**

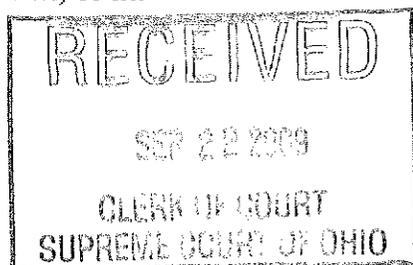
Defendants-Appellees.

: On Appeal from the Butler County Court
: of Appeals, Twelfth Appellate District
:
:
:
: Supreme Court Consolidates Case Nos.
: 2009-0558 and 2009-0649
:
: Court of Appeals
: Case No. CA 2008-02-044

REPLY BRIEF OF APPELLANT DOUG BERGMAN, ET AL.

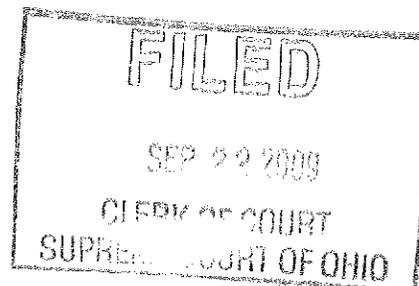
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ARGUMENTS

I. Proposition of Law No. 1: R.C. 4115.10(A) requires payment of the prevailing wage rate and entitles any employee paid less to recover from a contractor the full amount of the difference as underpaid wages, without reduction, regardless of the cause.

Monarch asks this Court read Ohio's Prevailing Wage Law in a way that frustrates and potentially denies an employee's recovery of unpaid wages. Specifically, it proposes that an employee should not be able to recover the full amount of unpaid wages from an employer if the underpayments partially result from a public authority's failure to notify the contractor of a change in wage rates. Instead, the employee must attempt to directly recover this amount from the public authority.

Monarch, however, ignores the fact that the law does not allow an employee to recover from most public authorities. R.C. 4115.10(A) creates an employee cause of action to recover underpayments, and specifies the entities an employee can sue. It does not permit an employee to sue a public authority that does not construct a public improvement with its own forces. Thus, R.C. 4115.05 allows the Director or a contractor to sue a noncompliant public authority, but R.C. 4115.10(A) does not allow an employee to bring the same action. Monarch's proposal leaves employees uncompensated and without legal remedy.

A. A contractor's liability for underpayments in an R.C. 4115.10(A) cannot be reduced pursuant to R.C. 4115.05.

Monarch cites this court's decision in *Ohio Asphalt Paving v. Ohio Department of Industrial Relations* for the proposition that a court hearing any prevailing wage action has the power to reduce a contractor's liability for underpayments resulting from a public authority's noncompliance pursuant to

R.C. 4115.05.¹ Monarch, however, does not consider the substantive and procedural implications of applying R.C. 4115.05 across the various means for enforcing the Prevailing Wage Law.

The *Ohio Asphalt* decision concerned the Director's determination of a contractor's liability during an R.C. 4115.13 administrative investigation. The Court stated that at the administrative level, the Director can hold a public authority liable for underpayments resulting from its failure to give notice pursuant to R.C. 4115.05.²

On the other hand, the present matter concerns a contractor's liability *after* the Director has closed the administrative investigation, and an employee asks a court to enforce the Director's determination pursuant to R.C. 4115.10(A). A court cannot employ an R.C. 4115.05 reduction at this stage for two reasons. First, as already stated above, such a reduction by the court leaves the employee without remedy against the public authority for the remainder of his or her back wages.³ Second, permitting the reduction at this level contradicts the express terms of R.C. 4115.05. The statute only allows the Director to reduce a contractor's liability if (1) the Director *determines* that the underpayments arose from the public authority's failure to give notice, and (2) the *Director enforces* that determination. Neither occur in an R.C. 4115.10(A) action.

¹ (1992), 63 Ohio St. 3d 512.

² *Id.* at 517.

³ Appellee admits that R.C. 4115.05 is unclear about how Appellant employees could enforce their rights against the public authority. Appellee Brief, pg. 6. On the other hand, a contractor who must pay for a public authority's noncompliance can clearly enforce its rights through contribution. *Ohio Asphalt*, 63 Ohio St. 3d 517.

Indeed, *Ohio Asphalt* supports the proposition that an R.C. 4115.10(A) court cannot impose an R.C. 4115.05 reduction. First, a contractor will not be overly prejudiced if it is held liable for the full amount of underpayments in an R.C. 4115.10(A) action. *Ohio Asphalt* expressly recognized a contractor's right to contribution from a public authority that shares liability for underpayments.⁴ Second, Appellant's interpretation best serves the purpose of Prevailing Wage Law espoused by *Ohio Asphalt*: to prevent the undercutting of employee wages.⁵ Employees should be able to recover the entire underpayment amount from the contractor, as opposed to having to join the public authority if a contractor cries foul, and prove its case against an additional defendant without the assistance of a Commerce determination. Appellee's interpretation makes it difficult for an employee to recover underpayments and would discourage employees from suing to recover.

B. R.C. 4115.16(B) does not allow an R.C. 4115.10(A) court to reduce a contractor's liability for underpayments pursuant to R.C. 4115.05.

Monarch further ignores the procedural distinctions present in the Prevailing Wage Law when it argues that R.C. 4115.16(B) allows a court hearing an R.C. 4115.10(A) action to sit in the place of the Director and reduce liability pursuant to R.C. 4115.05.⁶ R.C. 4115.16(B) grants a court no such authority, as it governs an entirely distinct procedural action.

R.C. 4115.16(B) and R.C. 4115.10(A) actions both start with the Director conducting an administrative investigation to audit a contractor's compliance

⁴ *Ohio Asphalt*, 63 Ohio St. 3d 517.

⁵ *Id.* at 151.

⁶ Appellee Brief, pg. 8.

with the Prevailing Wage Law pursuant to R.C. 4115.13(A). Then the similarities end.

In an R.C. 4115.16(B) action, an interested party files suit in the court of common pleas *before* the Director issues a determination. The Director immediately terminates its investigation, and instead, the court assumes the responsibility to hear and decide the case, issue a determination of compliance or violation, and order any necessary or appropriate relief.

In an R.C. 4115.10(A) action, however, the Director has completed its investigation of compliance and has issued a determination of liability. The employee files suit to enforce the determination and to recover the underpayments specified therein.

In sum, in an R.C. 4115.10(A) action, the Court does not sit in the place of the Director, because the Director has already *finished* the investigation and determined liability. Therefore, as they are district enforcement actions, R.C. 4115.16(B) does not grant a court hearing an R.C. 4115.10(A) action any additional power to reduce liability pursuant to R.C. 4115.05.

II. Proposition of Law No. 2: The penalties prescribed in R.C. 4115.10(A) are mandatory.

Certified Conflict: Is the 25% penalty set forth in R.C. 4115.10(A) a mandatory penalty that must be enforced against a party that violates prevailing wage statutes if the violation is not the result of statutory misinterpretation or payroll error?

The language and intent of R.C. 4115.10(A) indicates that the 25% penalty is mandatory. Monarch seizes upon a nearby “may” to argue the contrary. However, a literal reading of the statute reveals that R.C. 4115.10(A) states the

remedies available to a prevailing employee. It does not state the remedies that a court “may” award.

A. The penal nature of R.C. 4115.10(A) does not make the 25% penalty discretionary.

Monarch urges this Court to use strict rules of statutory construction to determine the meaning of R.C. 4115.10(A). However, its authority is distinguishable and its arguments are flawed.

Monarch relies upon *Dean v. Seco Electric Company* to argue for the strict construction of penal statutes.⁷ *Dean* held that underpaid employees could not recover statutory penalties from a surety under R.C. 4115.10(A), because the Prevailing Wage Law did not impose any obligations upon sureties.⁸ Monarch, on the other hand, is a general contractor and corporation that the statute holds specifically “liable for the statutory penalty, attorney fees, and costs for their failure to pay prevailing wages.”⁹ *Dean* is distinguishable on this ground and does not afford Monarch any relief.

Further, Monarch’s demand for the strictest possible construction is flawed, because where a statute’s meaning is clear, “there is no occasion for resorting to the rules of statutory interpretation.”¹⁰ Under a literal construction of R.C. 4115.10(A), the 25% penalty is mandatory.¹¹ The word “may” in the statute simply vests an underpaid employee with the discretion to seek redress.

⁷ (1988) 35 Ohio St. 3d 203, 205. See Appellee Brief, pg. 10.

⁸ *Id.* at 205-06.

⁹ *Id.* at 206.

¹⁰ *Sears v. Weimer* (1944), 143 Ohio St. 312, 316.

¹¹ R.C. 4115.10(A) states that an underpaid employee “may recover * * * the difference between the fixed rate of wages and the amount paid to the employee and in addition thereto a sum equal to twenty-five per cent of that difference.”

Read otherwise: (1) the recovery of underpaid wages is completely discretionary, (2) the following sentence stating that an offending entity “also shall pay” a 75% penalty makes little sense, and (3) the usefulness of an R.C. 4115.10 action to make an employee whole and prevent the undercutting of wages is significantly reduced. Thus, as written, the 25% penalty must be mandatory. The statute is to be applied, not further interpreted.¹²

Even if this Court finds the penalty provision of R.C. 4115.10(A) to be ambiguous, it should not narrowly construe the statute “in complete disregard of the purpose of the legislature” because of its penal nature.¹³ Rather, the court should apply the general rules of statutory construction,¹⁴ and consider the purpose and intent of the law.¹⁵ In this case, the legislature intended the 25% penalty provision to make underpaid employees whole and discourage future violations. Therefore, this Court should find the penalty mandatory.

B. A court hearing an R.C. 4115.10(A) action cannot waive the 25% penalty pursuant to R.C. 4115.13(C).

Monarch claims that a narrow exception within R.C. 4115.13(C) allows a court hearing an R.C. 4115.16(B) action to waive the statutory penalties, and that this exception also applies to the present matter. A court, however, cannot invoke Section 13(C) in an R.C. 4115.16(B) or an R.C. 4115.10(A) action.

¹² *Sears*, 143 Ohio St. 316.

¹³ *United States v. Campos-Serrano* (1971), 404 U.S. 293, 298 (“The canon of strict construction of criminal statutes, of course, does not mean that every criminal statute must be given the narrowest possible meaning in complete disregard of the purpose of the legislature.”).

¹⁴ R.C. 1.41 (stating that the Revised Code’s rules of statutory construction “apply to all statutes, * * * and to the rules adopted under them”).

¹⁵ *See* R.C. 1.49 (A) (stating that an ambiguous statute should be interpreted in light of “[t]he object sought to be attained”).

R.C. 4115.10(A) confers a right of action for any underpaid employee, “except an employee to whom or on behalf of whom restitution is made pursuant to division (C) of section 4115.13 of the Revised Code.” R.C. 4115.13(C), correspondingly, provides immunity from suit where (1) “*the Director*” makes a finding that an underpayment of wages resulted from (a) a misinterpretation of the prevailing-wage law or (b) an erroneous preparation of payroll documents *and* (2) the employer who made the mistake makes restitution for its error.¹⁶

Of course, an employee’s right of action under R.C. 4115.10(A) is not ripe until the Director issues a determination of underpayment, which has been likened to a “right to sue” letter. Thus, if the Director so chooses, it can effectively invoke R.C. 4115.13(C) at the administrative level, and cut off an employee’s right to sue and recover underpayments and penalties. By its terms and effect, R.C. 4115.13(C) can only be employed by the Director at the administrative level.

In the present case, the Director issued a determination, but made no R.C. 4115.13(C) decision. Specifically, the Director did *not* find that Monarch misinterpreted the prevailing-wage law or erroneously prepared payroll documents, *nor* did the Director order Monarch to make full restitution. Therefore, 4115.13(C) is inapplicable and the court cannot invoke it.¹⁷ Appellants

¹⁶ *Int’l Bh’d of Elec. Workers Local Union No. 8 v. Stollsteimer Elec.* (6th Dist. 2006), 168, Ohio app. 3d 238, 243-44, 2006-Ohio-3865, at ¶ 21.

¹⁷ *Mershman v. Enertech Corp.* (Hancock County Court of Common Pleas 2001), 120 Ohio Misc. 2d 70, 2001-Ohio-4733, at ¶ 37. In *Mershman*, the Director made a R.C. 4115.13(C) determination, but the employee filed an R.C. 4115.10(A) suit before restitution was paid. The court held that since restitution was a condition of immunity under R.C. 4115.13(C), the action was proper and the contractor had to pay the penalties and attorney fees as well.

were entitled to bring this action and seek the penalties specified in R.C. 4115.10(A).

Further, despite Appellee's assertions, R.C. 4115.16(B) does not allow an R.C. 4115.10(A) court to employ Section 13(C). R.C. 4115.16(B) itself does not authorize a court hearing a 16(B) action to invoke R.C. 4115.13(C).¹⁸ Further, Section 16(B) has no effect on what an R.C. 4115.13(C) court can and cannot do. The general assembly created of an employee right of action akin to R.C. 4115.10(A)¹⁹ nearly fifty years before it created an interested party action in R.C. 4115.16,²⁰ and the sections offer procedurally distinct mechanisms for enforcing the Prevailing Wage Law.

Finally, Appellee's argument is all form and no substance. Monarch does not allege statutory misinterpretations or payroll errors, nor has it made restitution to its employees. Further, Monarch cannot claim that a solitary exception to an otherwise mandatory remedy can make that remedy discretionary. For these reasons, the 25% penalty is mandatory and should be imposed in this matter.

C. The imposition of the 25% penalty on Monarch is just and fair.

Appellee and its Amici claim that the court should not impose the 25% penalty because Monarch was an innocent victim of the circumstances. The applicable law, however, indicates otherwise.

¹⁸ *Stollsteimer*, 168, Ohio App. 3d 238, 243-44, 2006-Ohio-3865, ¶ 21

¹⁹ General Code § 17-6 (Ohio 1931).

²⁰ R.C. 4115.16 (1978).

At least three appellate districts in Ohio have held that a contractor is liable for the prevailing wage law violations of its subcontractor(s).²¹ R.C. 4115.06 requires a contractor to “guarantee prevailing-wage compliance not only for himself but also for anyone who actually performs his contract.”²² Accordingly, a contractor cannot relieve itself of the responsibility to pay the prevailing-wage rate by merely subletting a portion of its work to a subcontractor.²³ This concept can be found throughout the law,²⁴ for example, in the Federal Davis-Bacon Act²⁵ and in general contract law.²⁶

Monarch voluntarily entered into a contract in which it promised to pay its employees the prevailing rate of wages.²⁷ It did not free itself from this liability

²¹ *Harris v. Bennett* (July 26, 1985), Lucas App. No. L-84-446, 1985 Ohio App. LEXIS 6820, 4. See also *Englehart v. C.T. Taylor Company, Inc.* (Dec. 8, 1999), Summit App. No. 19325, 1999 WL 1215110, 2; *Connell v. Wayne Builders Corp.* (Jan. 30, 1996), Franklin App. No. 95APE07-897, 1996 WL 39646, 2; *Cremeans v. Jinco* (June 5, 1986), Franklin App. No. 85AP-821, 1986 Ohio App. LEXIS 6996, 11.

²² *Taylor v. Douglas Co.* (Lucas County Court of Common Pleas 2004), 823 N.E.2d 549, 554.

²³ *Cremeans*, Franklin App. No. 85AP-821.

²⁴ *Id.* (“Ordinarily, the subletting of a portion of the work to be performed under a contract to a subcontractor does not relieve the contractor from his responsibility to the public authority that the work under the contract be performed in accordance with the terms of the contract. If the subcontractor fails to perform in accordance with the contract, the contractor is ordinarily liable to the contracting public authority for such default by the subcontractor. There is nothing in R.C. Chapter 4115 indicating that such principle does not apply to the provision of public work contracts with respect to payment of prevailing-wage rates.”).

²⁵ Section 5.5(a)(6), Title 29, C.F.R.

²⁶ See Restatement of the Law 2d, Contracts (1981) 44, Intended And Incidental Beneficiaries, Section 302, Comment e, Illustration 19.

²⁷ R.C. 4115.06 provides that “[T]he contract executed between the public authority and the successful bidder shall contain a provision requiring the successful bidder and all his subcontractors to pay a rate of wages which shall not be less than the rate of wages so fixed. The successful bidder and all his subcontractors shall comply strictly with the wage provisions of the contract.”

by contracting its work out to a subcontractor. Thus, any excuse of innocence is disingenuous.

Finally, the imposition of the 25% fine upon Monarch is just because it serves two purposes. First, it compensates employees for underpayments beyond mere restitution. Second, it encourages general contractors to carefully select and audit their subcontractors to ensure compliance with the law. Both of these purposes serve the primary goal of the Prevailing Wage Law to support the integrity of the collective bargaining process by preventing the undercutting of employee wages."²⁸ Therefore, this Court should impose the 25% fine against Monarch.

III. Proposition of Law No. 3: An R.C. 4115.10(A) action is a special statutory proceeding wherein, upon finding an underpayment, the court has a statutory duty to order payment of the 75% penalty to commerce.

Appellants brought this action pursuant to R.C. 4115.10(A), which allows an underpaid employee to sue her employer to recover the amount of the underpayment, in addition to 25% of that deficiency. The very next sentence of the statute requires the contractor to pay 75% of the underpayment to the Director. This is followed by the statute of limitations for employee actions and a provision entitling prevailing employees to costs and reasonable attorneys' fees.

Monarch argues that Appellants lack standing to enforce the 75% penalty. Monarch, however, overlooks the fact that standing does not flow from the "real party in interest" doctrine alone.²⁹

²⁸ *Ohio Asphalt*, 63 Ohio St. 3d 515.

²⁹ *City of Middletown v. Ferguson* (1986), 25 Ohio St.3d 71, 76.

Standing may also be conferred by statute.³⁰ Indeed, where a legislative authority provides a statutory remedy, the question of standing does not initially turn on whether the party has alleged a personal stake in the remedy.³¹ Rather the inquiry as to standing must begin with a determination of whether the statute in question authorizes the remedy for the plaintiff.³²

Here, R.C. 4115.10(A) expressly allows an employee to recover a 75% penalty paid to the Department of Commerce.³³ Therefore, Appellants have standing in this case pursuant to a special statutory grant of authority. With standing thus established, Appellants ask that this Court enforce the terms of the statute and hold that an R.C. 4115.10(A) court that finds an underpayment must impose the 75% penalty.

CONCLUSION

For all of the reasons discussed above and those in Appellant's Merit Brief, this Court should reverse the decision of the Twelfth District Court of Appeals.

Respectfully Submitted,



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³⁰ *Id.*

³¹ *Id.*, citing *Sierra Club v. Morton* (1972), 405 U.S. 727, 731-732.

³² *Id.*

³³ Note that the fact that the penalty is paid to the Department of Commerce does not damage the statutory grant of standing or the mandatory nature of the penalty. *See e.g. Milner v. Farmers Ins. Exchange* (Minn. 2008), 748 N.W.2d 608, 610-11 (construing the Minnesota Fair Labor Standards Act to allow employees to bring civil actions to enforce the law and seek civil penalties payable to the state).

CERTIFICATE OF SERVICE

I certify that on this 21st day of September, 2009, a copy of this Reply Brief of Appellants Doug Bergman, et al. was sent by ordinary U.S. Mail to:

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APPENDIX

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WITH THE SECRETARY OF STATE THROUGH JULY 16, 2009 ***
*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JULY 1, 2009 ***

OHIO REVISED CODE GENERAL PROVISIONS
CHAPTER 1. DEFINITIONS; RULES OF CONSTRUCTION
CONSTRUCTION

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ORC Ann. 1.41 (2009)

§ 1.41. Applicability of sections 1.41 to 1.59

Sections 1.41 to 1.59, inclusive, of the Revised Code apply to all statutes, subject to the conditions stated in section 1.51 of the Revised Code, and to rules adopted under them.

HISTORY:

134 v H 607. Eff 1-3-72.

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*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JULY 1, 2009 ***

OHIO REVISED CODE GENERAL PROVISIONS
CHAPTER 1. DEFINITIONS; RULES OF CONSTRUCTION
CONSTRUCTION

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ORC Ann. 1.49 (2009)

§ 1.49. Ambiguous statutes

If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

- (A) The object sought to be attained;
- (B) The circumstances under which the statute was enacted;
- (C) The legislative history;
- (D) The common law or former statutory provisions, including laws upon the same or similar subjects;
- (E) The consequences of a particular construction;
- (F) The administrative construction of the statute.

HISTORY:

134 v H 607. Eff 1-3-72.

LEXSTAT ORC ANN. 4115.06

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TITLE 41. LABOR AND INDUSTRY
CHAPTER 4115. WAGES AND HOURS ON PUBLIC WORKS
PREVAILING WAGE LAW

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ORC Ann. 4115.06 (2009)

§ 4115.06. Contract to contain minimum wage provisions

In all cases where any public authority fixes a prevailing rate of wages under section 4115.04 of the Revised Code, and the work is done by contract, the contract executed between the public authority and the successful bidder shall contain a provision requiring the successful bidder and all his subcontractors to pay a rate of wages which shall not be less than the rate of wages so fixed. The successful bidder and all his subcontractors shall comply strictly with the wage provisions of the contract.

Where a public authority constructs a public improvement with its own forces, such public authority shall pay a rate of wages which shall not be less than the rate of wages fixed as provided in section 4115.04 of the Revised Code, except in those instances provided for in sections 723.52, 5517.02, 5575.01, and 5543.19 of the Revised Code.

HISTORY:

GC § 17-5; 114 v 116, § 3; 116 v 206; Bureau of Code Revision, 10-1-53; 131 v 993 (Eff 11-3-65); 134 v H 785 (Eff 12-17-71); 136 v H 1304. Eff 8-25-76.

LEXSTAT ORC ANN. 4115.10

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TITLE 41. LABOR AND INDUSTRY
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ORC Ann. 4115.10 (2009)

§ 4115.10. Prohibitions; penalties paid to employee and department; complaints by employees; audits

(A) No person, firm, corporation, or public authority that constructs a public improvement with its own forces, the total overall project cost of which is fairly estimated to be more than the amounts set forth in division (B)(1) or (2) of section 4115.03 of the Revised Code, adjusted biennially by the director of commerce pursuant to section 4115.034 [4115.03.4] of the Revised Code, shall violate the wage provisions of sections 4115.03 to 4115.16 of the Revised Code, or suffer, permit, or require any employee to work for less than the rate of wages so fixed, or violate the provisions of section 4115.07 of the Revised Code. Any employee upon any public improvement, except an employee to whom or on behalf of whom restitution is made pursuant to division (C) of section 4115.13 of the Revised Code, who is paid less than the fixed rate of wages applicable thereto may recover from such person, firm, corporation, or public authority that constructs a public improvement with its own forces the difference between the fixed rate of wages and the amount paid to the employee and in addition thereto a sum equal to twenty-five per cent of that difference. The person, firm, corporation, or public authority who fails to pay the rate of wages so fixed also shall pay a penalty to the director of seventy-five per cent of the difference between the fixed rate of wages and the amount paid to the employees on the public improvement. The director shall deposit all moneys received from penalties paid to the director pursuant to this section into the penalty enforcement fund, which is hereby created in the state treasury. The director shall use the fund for the enforcement of sections 4115.03 to 4115.16 of the Revised Code. The employee may file suit for recovery within ninety days of the director's determination of a violation of sections 4115.03 to 4115.16 of the Revised Code or is barred from further action under this division. Where the employee prevails in a suit, the employer shall pay the costs and reasonable attorney's fees allowed by the court.

(B) Any employee upon any public improvement who is paid less than the prevailing rate of wages applicable thereto may file a complaint in writing with the director upon a form furnished by the director. The complaint shall include documented evidence to demonstrate that the employee was paid less than the prevailing wage in violation of this chapter. Upon receipt of a properly completed written complaint of any employee paid less than the prevailing rate of wages applicable, the director shall take an assignment of a claim in trust for the assigning employee and bring any legal action necessary to collect the claim. The employer shall pay the costs and reasonable attorney's fees allowed by the court if the employer is found in violation of sections 4115.03 to 4115.16 of the Revised Code.

(C) If after investigation pursuant to section 4115.13 of the Revised Code, the director determines there is a

ORC Ann. 4115.10

violation of sections 4115.03 to 4115.16 of the Revised Code and a period of sixty days has elapsed from the date of the determination, and if:

(1) No employee has brought suit pursuant to division (A) of this section;

(2) No employee has requested that the director take an assignment of a wage claim pursuant to division (B) of this section;

The director shall bring any legal action necessary to collect any amounts owed to employees and the director. The director shall pay over to the affected employees the amounts collected to which the affected employees are entitled under division (A) of this section. In any action in which the director prevails, the employer shall pay the costs and reasonable attorney's fees allowed by the court.

(D) Where persons are employed and their rate of wages has been determined as provided in section 4115.04 of the Revised Code, no person, either for self or any other person, shall request, demand, or receive, either before or after the person is engaged, that the person so engaged pay back, return, donate, contribute, or give any part or all of the person's wages, salary, or thing of value, to any person, upon the statement, representation, or understanding that failure to comply with such request or demand will prevent the procuring or retaining of employment, and no person shall, directly or indirectly, aid, request, or authorize any other person to violate this section. This division does not apply to any agent or representative of a duly constituted labor organization acting in the collection of dues or assessments of such organization.

(E) The director shall enforce sections 4115.03 to 4115.16 of the Revised Code.

(F) For the purpose of supplementing existing resources and to assist in enforcing division (E) of this section, the director may contract with a person registered as a public accountant under Chapter 4701. of the Revised Code to conduct an audit of a person, firm, corporation, or public authority.

HISTORY:

GC § 17-6; 114 v 116, § 4; 118 v 587; Bureau of Code Revision, 10-1-53; 128 v 935 (Eff 11-9-59); 131 v 995 (Eff 11-3-65); 133 v H 436 (Eff 10-14-69); 136 v H 1304 (Eff 8-25-76); 137 v H 1129 (Eff 9-25-78); 145 v H 350 (Eff 6-21-94); 146 v S 162 (Eff 10-29-95); 146 v S 293 (Eff 9-26-96); 148 v H 471 (Eff 7-1-2000); 149 v H 94. Eff 6-6-2001; 150 v H 95, § 1, eff. 9-26-03.

LEXSTAT ORC ANN. 4115.13

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TITLE 41. LABOR AND INDUSTRY
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ORC Ann. 4115.13 (2009)

§ 4115.13. Investigations; recommendations; decisions; effect of intentional violation; appeals

(A) Upon the director's own motion or within five days of the filing of a complaint under section 4115.10 or 4115.16 of the Revised Code, the director of commerce, or a representative designated by the director, shall investigate any alleged violation of sections 4115.03 to 4115.16 of the Revised Code.

(B) At the conclusion of the investigation, the director or a designated representative shall make a recommendation as to whether the alleged violation was committed. If the director or designated representative recommends that the alleged violation was an intentional violation, the director or designated representative shall give written notice by certified mail of that recommendation to the contractor, subcontractor, or officer of the contractor or subcontractor which also shall state that the contractor, subcontractor, or officer of the contractor or subcontractor may file with the director an appeal of the recommendation within thirty days after the date the notice was received. If the contractor, subcontractor, or officer of the contractor or subcontractor timely appeals the recommendation, within sixty days of the filing of the appeal, the director or designated representative shall schedule the appeal for a hearing. If the contractor, subcontractor, or officer of the contractor or subcontractor fails to timely appeal the recommendation, the director or designated representative shall adopt the recommendation as a finding of fact for purposes of division (D) of this section. The director or designated representative, in the performance of any duty or execution of any power prescribed by sections 4115.03 to 4115.16 of the Revised Code, may hold hearings, and such hearings shall be held within the county in which the violation of sections 4115.03 to 4115.16 of the Revised Code is alleged to have been committed, or in Franklin county, whichever county the person alleged to have committed the violation chooses. For the purpose of the hearing, the director may designate a hearing examiner who shall, after notice to all interested parties, conduct a hearing and make findings of fact and recommendations to the director. The director shall make a decision, which shall be sent to the affected parties. The director or designated representative may make decisions, based upon findings of fact, as are found necessary to enforce sections 4115.03 to 4115.16 of the Revised Code.

(C) If any underpayment by a contractor or subcontractor was the result of a misinterpretation of the statute, or an erroneous preparation of the payroll documents, the director or designated representative may make a decision ordering the employer to make restitution to the employees, or on their behalf, the plans, funds, or programs for any type of fringe benefits described in the applicable wage determination. In accordance with the finding of the director that any underpayment was the result of a misinterpretation of the statute, or an erroneous preparation of the payroll documents,

employers who make restitution are not subject to any further proceedings pursuant to sections 4115.03 to 4115.16 of the Revised Code.

(D) If the director or designated representative makes a decision, based upon findings of fact, that a contractor, subcontractor, or officer of a contractor or subcontractor has intentionally violated sections 4115.03 to 4115.16 of the Revised Code, the contractor, subcontractor, or officer of a contractor or subcontractor is prohibited from contracting directly or indirectly with any public authority for the construction of a public improvement or from performing any work on the same as provided in section 4115.133 [4115.13.3] of the Revised Code. A contractor, subcontractor, or officer of a contractor or subcontractor may appeal the decision, within sixty days after the decision, to the court of common pleas of the county in which the first hearing involving the violation was heard. If the contractor, subcontractor, or officer of a contractor or subcontractor does not timely appeal the recommendation of the director or designated representative under division (B) of this section, the contractor, subcontractor, or officer of a contractor or subcontractor may appeal the findings of fact, within sixty days after the recommendations are adopted as findings of fact, to the court of common pleas within the county in which the violation of sections 4115.03 to 4115.16 of the Revised Code is alleged to have been committed or in Franklin county, whichever county the person alleged to have committed the violation chooses.

(E) No appeal to the court from the decision of the director may be had by the contractor or subcontractor unless the contractor or subcontractor files a bond with the court in the amount of the restitution, conditioned upon payment should the decision of the director be upheld.

(F) No statement of a contractor, subcontractor, or officer of a contractor or subcontractor and no recommendation or finding of fact issued under this section is admissible as evidence in a criminal action brought under this chapter against the contractor, subcontractor, or officer of a contractor or subcontractor.

(G) In determining whether a contractor, subcontractor, or officer of a contractor or subcontractor intentionally violated sections 4115.03 to 4115.16 of the Revised Code, the director may consider as evidence either of the following:

(1) The fact that the director, prior to the commission of the violation under consideration, issued notification to the contractor, subcontractor, or officer of a contractor or subcontractor of the same or a similar violation, provided that the commission of the same or a similar violation of sections 4115.03 to 4115.16 of the Revised Code at a subsequent time does not create a presumption that the subsequent violation was intentional;

(2) The fact that, prior to the commission of the violation, the contractor, subcontractor, or officer of a contractor or subcontractor used reasonable efforts to ascertain the correct interpretation of sections 4115.03 to 4115.16 of the Revised Code from the director or [designated representative or the public authority pursuant to section]* 4115.04 or 4115.131 [4115.13.1] of the Revised Code, provided that a violation is presumed not to be intentional where a contractor, subcontractor, or officer of a contractor or subcontractor complies with a decision the director or designated representative issues pursuant to a request made under section 4115.131 [4115.13.1] of the Revised Code.

(H) As used in this section, "intentional violation" means a willful, knowing, or deliberate failure to comply with any provision of sections 4115.03 to 4115.16 of the Revised Code, and includes, but is not limited to, the following actions when conducted in the manner described in this division:

(1) An intentional failure to submit reports as required under division (C) of section 4115.071 [4115.07.1] of the Revised Code or knowingly submitting false or erroneous reports;

(2) An intentional misclassification of employees for the purpose of reducing wages;

(3) An intentional misclassification of employees as independent contractors or as apprentices;

(4) An intentional failure to pay the prevailing wage;

ORC Ann. 4115.13

(5) An intentional failure to comply with the allowable ratio of apprentices to skilled workers as required under section 4115.05 of the Revised Code and by rules adopted by the director pursuant to section 4115.12 of the Revised Code;

(6) Intentionally allowing an officer of a contractor or subcontractor who is known to be prohibited from contracting directly or indirectly with a public authority for the construction of a public improvement or from performing any work on the same pursuant to section 4115.133 [4115.13.3] of the Revised Code to perform work on a public improvement.

HISTORY:

131 v 996 (Eff 11-3-65); 133 v H 436 (Eff 10-14-69); 136 v H 1304 (Eff 8-25-76); 137 v H 1129 (Eff 9-25-78); 145 v H 350 (Eff 6-21-94); 146 v S 162 (Eff 10-29-95); 148 v H 471. Eff 7-1-2000.

LEXSTAT ORC ANN. 4115.16

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ORC Ann. 4115.16 (2009)

§ 4115.16. Complaint by interested party; investigation; appeal to court

(A) An interested party may file a complaint with the director of commerce alleging a violation of sections 4115.03 to 4115.16 of the Revised Code. The director, upon receipt of a complaint, shall investigate pursuant to section 4115.13 of the Revised Code. If the director determines that no violation has occurred or that the violation was not intentional, the interested party may appeal the decision to the court of common pleas of the county where the violation is alleged to have occurred.

(B) If the director has not ruled on the merits of the complaint within sixty days after its filing, the interested party may file a complaint in the court of common pleas of the county in which the violation is alleged to have occurred. The complaint may make the contracting public authority a party to the action, but not the director. Contemporaneous with service of the complaint, the interested party shall deliver a copy of the complaint to the director. Upon receipt thereof, the director shall cease investigating or otherwise acting upon the complaint filed pursuant to division (A) of this section. The court in which the complaint is filed pursuant to this division shall hear and decide the case, and upon finding that a violation has occurred, shall make such orders as will prevent further violation and afford to injured persons the relief specified under sections 4115.03 to 4115.16 of the Revised Code. The court's finding that a violation has occurred shall have the same consequences as a like determination by the director. The court may order the director to take such action as will prevent further violation and afford to injured persons the remedies specified under sections 4115.03 to 4115.16 of the Revised Code. Upon receipt of any order of the court pursuant to this section, the director shall undertake enforcement action without further investigation or hearings.

(C) The director shall make available to the parties to any appeal or action pursuant to this section all files, documents, affidavits, or other information in the director's possession that pertain to the matter. The rules generally applicable to civil actions in the courts of this state shall govern all appeals or actions under this section. Any determination of a court under this section is subject to appellate review.

(D) Where, pursuant to this section, a court finds a violation of sections 4115.03 to 4115.16 of the Revised Code, the court shall award attorney fees and court costs to the prevailing party. In the event the court finds that no violation has occurred, the court may award court costs and attorney fees to the prevailing party, other than to the director or the public authority, where the court finds the action brought was unreasonable or without foundation, even though not

brought in subjective bad faith.

HISTORY:

137 v H 1129 (Eff 9-25-78); 145 v H 350 (Eff 6-21-94); 146 v S 162 (Eff 10-29-95); 148 v H 471 . Eff 7-1-2000.

LEXSTAT 29 CFR 5.5

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*** THIS SECTION IS CURRENT THROUGH THE SEPTEMBER 10, 2009 ISSUE OF ***
*** THE FEDERAL REGISTER ***

TITLE 29 -- LABOR
SUBTITLE A -- OFFICE OF THE SECRETARY OF LABOR
PART 5 -- LABOR STANDARDS PROVISIONS APPLICABLE TO CONTRACTS COVERING FEDERALLY
FINANCED AND ASSISTED CONSTRUCTION (ALSO LABOR STANDARDS PROVISIONS APPLICABLE
TO NONCONSTRUCTION CONTRACTS SUBJECT TO THE CONTRACT WORK HOURS AND SAFETY
STANDARDS ACT)
SUBPART A -- DAVIS-BACON AND RELATED ACTS PROVISIONS AND PROCEDURES

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29 CFR 5.5

§ 5.5 Contract provisions and related matters.

[PUBLISHER'S NOTE: Paragraph (a)(1)(ii) was suspended indefinitely at 58 FR 58954, 58955, Nov. 5, 1993.]

(a) The Agency head shall cause or require the contracting officer to insert in full in any contract in excess of \$ 2,000 which is entered into for the actual construction, alteration and/or repair, including painting and decorating, of a public building or public work, or building or work financed in whole or in part from Federal funds or in accordance with guarantees of a Federal agency or financed from funds obtained by pledge of any contract of a Federal agency to make a loan, grant or annual contribution (except where a different meaning is expressly indicated), and which is subject to the labor standards provisions of any of the acts listed in § 5.1, the following clauses (or any modifications thereof to meet the particular needs of the agency, Provided, That such modifications are first approved by the Department of Labor):

(1) Minimum wages. (i) All laborers and mechanics employed or working upon the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project), will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR part 3)), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics.

Contributions made or costs reasonably anticipated for bona fide fringe benefits under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of paragraph (a)(1)(iv) of this section; also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics shall

29 CFR 5.5

be paid the appropriate wage rate and fringe benefits on the wage determination for the classification of work actually performed, without regard to skill, except as provided in § 5.5(a)(4). Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein: Provided, That the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage determination (including any additional classification and wage rates conformed under paragraph (a)(1)(ii) of this section) and the Davis-Bacon poster (WH-1321) shall be posted at all times by the contractor and its subcontractors at the site of the work in a prominent and accessible place where it can be easily seen by the workers.

(ii)(A) The contracting officer shall require that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The contracting officer shall approve an additional classification and wage rate and fringe benefits therefore only when the following criteria have been met:

(1) The work to be performed by the classification requested is not performed by a classification in the wage determination; and

(2) The classification is utilized in the area by the construction industry; and

(3) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

(B) If the contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the contracting officer agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by the contracting officer to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, DC 20210. The Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(C) In the event the contractor, the laborers or mechanics to be employed in the classification or their representatives, and the contracting officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer shall refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Administrator for determination. The Administrator, or an authorized representative, will issue a determination within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(D) The wage rate (including fringe benefits where appropriate) determined pursuant to paragraphs (a)(1)(ii) (B) or (C) of this section, shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

(iii) Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the contractor shall either pay the benefit as stated in the wage determination or shall pay another bona fide fringe benefit or an hourly cash equivalent thereof.

(iv) If the contractor does not make payments to a trustee or other third person, the contractor may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program, Provided, That the Secretary of Labor has found, upon the written request of the contractor, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.

(2) Withholding. The (write in name of Federal Agency or the loan or grant recipient) shall upon its own action or

upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld from the contractor under this contract or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the contractor or any subcontractor the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper, employed or working on the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project), all or part of the wages required by the contract, the (Agency) may, after written notice to the contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

(3) Payrolls and basic records. (i) Payrolls and basic records relating thereto shall be maintained by the contractor during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work (or under the United States Housing Act of 1937, or under the Housing Act of 1949, in the construction or development of the project). Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid. Whenever the Secretary of Labor has found under 29 CFR 5.5(a)(1)(iv) that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in section 1(b)(2)(B) of the Davis-Bacon Act, the contractor shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits. Contractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs.

(ii)(A) The contractor shall submit weekly (for each week in which any contract work is performed) a copy of all payrolls to the (write in name of appropriate federal agency) if the agency is a party to the contract, but if the agency is not such a party, the contractor will submit the payrolls to the applicant, sponsor, or owner, as the case may be, for transmission to the (write in name of agency). The payrolls submitted shall set out accurately and completely all of the information required to be maintained under 29 CFR 5.5(a)(3)(i), except that full social security numbers and home addresses shall not be included on weekly transmittals. Instead the payrolls shall only need to include an individually identifying number for each employee (e.g., the last four digits of the employee's social security number). The required weekly payroll information may be submitted in any form desired. Optional Form WH-347 is available for this purpose from the Wage and Hour Division Web site at <http://www.dol.gov/esa/whd/forms/wh347instr.htm> or its successor site. The prime contractor is responsible for the submission of copies of payrolls by all subcontractors. Contractors and subcontractors shall maintain the full social security number and current address of each covered worker, and shall provide them upon request to the (write in name of appropriate federal agency) if the agency is a party to the contract, but if the agency is not such a party, the contractor will submit them to the applicant, sponsor, or owner, as the case may be, for transmission to the (write in name of agency), the contractor, or the Wage and Hour Division of the Department of Labor for purposes of an investigation or audit of compliance with prevailing wage requirements. It is not a violation of this section for a prime contractor to require a subcontractor to provide addresses and social security numbers to the prime contractor for its own records, without weekly submission to the sponsoring government agency (or the applicant, sponsor, or owner).

(B) Each payroll submitted shall be accompanied by a "Statement of Compliance," signed by the contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract and shall certify the following:

29 CFR 5.5

(1) That the payroll for the payroll period contains the information required to be provided under § 5.5 (a)(3)(ii) of Regulations, 29 CFR part 5, the appropriate information is being maintained under § 5.5 (a)(3)(i) of Regulations, 29 CFR part 5, and that such information is correct and complete;

(2) That each laborer or mechanic (including each helper, apprentice, and trainee) employed on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in Regulations, 29 CFR part 3;

(3) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the contract.

(C) The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 shall satisfy the requirement for submission of the "Statement of Compliance" required by paragraph (a)(3)(ii)(B) of this section.

(D) The falsification of any of the above certifications may subject the contractor or subcontractor to civil or criminal prosecution under section 1001 of title 18 and section 231 of title 31 of the United States Code.

(iii) The contractor or subcontractor shall make the records required under paragraph (a)(3)(i) of this section available for inspection, copying, or transcription by authorized representatives of the (write the name of the agency) or the Department of Labor, and shall permit such representatives to interview employees during working hours on the job. If the contractor or subcontractor fails to submit the required records or to make them available, the Federal agency may, after written notice to the contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Furthermore, failure to submit the required records upon request or to make such records available may be grounds for debarment action pursuant to 29 CFR 5.12.

(4) Apprentices and trainees -- (i) Apprentices. Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship Training, Employer and Labor Services or with a State Apprenticeship Agency recognized by the Office, or if a person is employed in his or her first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Office of Apprenticeship Training, Employer and Labor Services or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice. The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the contractor as to the entire work force under the registered program. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated above, shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. Where a contractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in the contractor's or subcontractor's registered program shall be observed. Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeymen hourly rate specified in the applicable wage determination. Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator determines that a different practice prevails for the applicable apprentice classification, fringes shall be paid in accordance with that determination. In the event the Office of Apprenticeship Training, Employer and Labor Services, or a State Apprenticeship Agency recognized by the Office,

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withdraws approval of an apprenticeship program, the contractor will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(ii) Trainees. Except as provided in 29 CFR 5.16, trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration. The ratio of trainees to journeymen on the job site shall not be greater than permitted under the plan approved by the Employment and Training Administration. Every trainee must be paid at not less than the rate specified in the approved program for the trainee's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed on the wage determination unless the Administrator of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman wage rate on the wage determination which provides for less than full fringe benefits for apprentices. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Employment and Training Administration shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. In the event the Employment and Training Administration withdraws approval of a training program, the contractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(iii) Equal employment opportunity. The utilization of apprentices, trainees and journeymen under this part shall be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 29 CFR part 30.

(5) Compliance with Copeland Act requirements. The contractor shall comply with the requirements of 29 CFR part 3, which are incorporated by reference in this contract.

(6) Subcontracts. The contractor or subcontractor shall insert in any subcontracts the clauses contained in 29 CFR 5.5(a)(1) through (10) and such other clauses as the (write in the name of the Federal agency) may by appropriate instructions require, and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses in 29 CFR 5.5.

(7) Contract termination: debarment. A breach of the contract clauses in 29 CFR 5.5 may be grounds for termination of the contract, and for debarment as a contractor and a subcontractor as provided in 29 CFR 5.12.

(8) Compliance with Davis-Bacon and Related Act requirements. All rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 CFR parts 1, 3, and 5 are herein incorporated by reference in this contract.

(9) Disputes concerning labor standards. Disputes arising out of the labor standards provisions of this contract shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

(10) Certification of eligibility. (i) By entering into this contract, the contractor certifies that neither it (nor he or she) nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

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(ii) No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government contract by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

(iii) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

(b) Contract Work Hours and Safety Standards Act. The Agency Head shall cause or require the contracting officer to insert the following clauses set forth in paragraphs (b)(1), (2), (3), and (4) of this section in full in any contract in an amount in excess of \$ 100,000 and subject to the overtime provisions of the Contract Work Hours and Safety Standards Act. These clauses shall be inserted in addition to the clauses required by § 5.5(a) or 4.6 of part 4 of this title. As used in this paragraph, the terms laborers and mechanics include watchmen and guards.

(1) Overtime requirements. No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek.

(2) Violation; liability for unpaid wages; liquidated damages. In the event of any violation of the clause set forth in paragraph (b)(1) of this section the contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in paragraph (b)(1) of this section, in the sum of \$10 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in paragraph (b)(1) of this section.

(3) Withholding for unpaid wages and liquidated damages. The (write in the name of the Federal agency or the loan or grant recipient) shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by the contractor or subcontractor under any such contract or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime contractor, such sums as may be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in paragraph (b)(2) of this section.

(4) Subcontracts. The contractor or subcontractor shall insert in any subcontracts the clauses set forth in paragraph (b)(1) through (4) of this section and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in paragraphs (b)(1) through (4) of this section.

(c) In addition to the clauses contained in paragraph (b), in any contract subject only to the Contract Work Hours and Safety Standards Act and not to any of the other statutes cited in § 5.1, the Agency Head shall cause or require the contracting officer to insert a clause requiring that the contractor or subcontractor shall maintain payrolls and basic payroll records during the course of the work and shall preserve them for a period of three years from the completion of the contract for all laborers and mechanics, including guards and watchmen, working on the contract. Such records shall contain the name and address of each such employee, social security number, correct classifications, hourly rates of wages paid, daily and weekly number of hours worked, deductions made, and actual wages paid. Further, the Agency Head shall cause or require the contracting officer to insert in any such contract a clause providing that the records to be maintained under this paragraph shall be made available by the contractor or subcontractor for inspection, copying, or transcription by authorized representatives of the (write the name of agency) and the Department of Labor, and the contractor or subcontractor will permit such representatives to interview employees during working hours on the job.

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(The information collection, recordkeeping, and reporting requirements contained in the following paragraphs of this section were approved by the Office of Management and Budget:

Paragraph	OMB Control Number
(a)(1)(ii)(B)	1215-0140
(a)(1)(ii)(C)	1215-0140
(a)(1)(iv)	1215-0140
(a)(3)(i)	1215-0140, 1215-0017
(a)(3)(ii)(A)	1215-0149
(c)	1215-0140, 1215-0017

(Approved by the Office of Management and Budget under control number 1215-0149)

4612 words

tion of executive secretary of a commission created by that body because the position is a civil office under O. Const., Art. II, § 10: 1933 A.G.Opns.No. 1012.

SEC. 17-1.

See opinions of attorney general (1927), p. 201; (1929), p. 600.

SEC. 17-3. Definitions of terms.

The term "public authority," as used in this act, shall mean any officer, board or commission of the state of Ohio, or any political subdivision thereof, authorized by law to enter into a contract for the construction of a public improvement. The term construction, as used in this act shall mean any construction, re-construction, improvement, enlargement or repair of any public improvement. The term "public improvement," as used in this act, shall include all buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works, and all other structures or works constructed by the state of Ohio or any political subdivision thereof. The term "locality," as used in this act, shall mean the county wherein the physical work upon any public improvement is being performed.

HISTORY.—114 v. 116, § 1. EN. 7-27-31.

See note, G.C. § 17-6, citing Clymer v. Zane.

SEC. 17-4. Public authority may determine wages to be paid by successful bidder, when.

Any public authority authorized to contract for a public improvement may, before advertising for bids for the construction thereof, fix and determine a fair rate of wages to be paid by the successful bidder to the employees in the various branches or classes of the work, which shall not be less than the prevailing rate of wages paid for each such branch or class in the locality wherein the physical work upon such improvement is to be performed. The rate of wages so fixed shall be printed on the bidding blanks.

HISTORY.—114 v. 116, § 2. EN. 7-27-31.

See note; G.C. § 17-6, citing Clymer v. Zane.

Where a person or firm furnishes materials to a contractor or subcontractor to be used in the construction of a public improvement and such person or firm has nothing to do with the installation or fabrication of such materials into such improvement, G.C. §§ 17-4 to 17-6, do not operate to empower the public authority authorized to contract for such improvement to provide in the contract with the successful bidder a minimum rate of wages to be paid to the men employed and paid by such person or firm furnishing such materials when engaged in the delivery of such materials to the site of improvement: 1932 A.G.Opns.No.4836.

SEC. 17-5. Contract to contain provision relative to rate of wages to be paid.

In all cases where any public authority shall fix a fair rate or rates of wages as herein provided, the contract executed between the public authority and the successful bidder shall contain a provision requiring the successful bidder and all his sub-contractors to pay a rate or rates of

wages which shall not be less than the rate or rates of wages so fixed. It shall be the duty of the successful bidder and all his sub-contractors to strictly comply with such provisions of the contract.

HISTORY.—114 v. 116, § 3. EN. 7-27-31.

See note, G.C. § 17-6, citing Clymer v. Zane.

SEC. 17-6. Penalty for violation.

Any contractor or sub-contractor who shall violate the wage provisions of such contract, or who shall suffer, permit or require any employee to work for less than the rate of wages so fixed, shall be fined not less than \$50.00 or more than \$500.00. Any employee upon any public improvement who is paid less than the fixed rate of wages applicable thereto may recover from the contractor or sub-contractor the difference between the fixed rate of wages and the amount paid to him, and in addition thereto a penalty equal in amount to such difference.

HISTORY.—114 v. 116, § 4. EN. 7-27-31.

General Code §§ 17-3, 17-4, 17-5 and 17-6, and any contract made in compliance therewith, must be construed together, and their scope cannot be extended beyond the ordinary intentment of § 17-6 which imposes the penalty and gives the right of recovery: Clymer v. Zane, 128 O.S. 359, 191 N.E. 123.

SEC. 18.

See note, G.C. § 6886, citing 1931 A.G.Opns.2981.

See opinions of attorney general (1927), p. 1004; (1928), p. 1210.

There is no authority in law to accept popular subscriptions for salaries and expenses of state library: 1927 A. G. Opns. 1002.

SEC. 24.

See G.C. §§ 24-4, 433, 6064-10, 6212-58, which refer to this section.

See opinions of attorney general (1926), p. 266; (1927), pp. 227, 1683; (1928), p. 1946.

Funds of department must be deposited weekly with the state treasurer and are not subject to re-use without appropriation. Rotary funds are automatically re-appropriated: 1927 A. G. Opns. 227.

Refunds of over-payments of franchise tax cannot be made in the absence of specific appropriation therefor: 1927 A. G. Opns. 1682.

SEC. 24-3. State depository trust fund created.

For the purpose of providing a method of properly collecting, depositing and auditing of contingent receipts, received by various state departments, there is hereby created the state depository trust fund of which the treasurer of state shall be the custodian.

HISTORY.—115 v. 533, § 1. EN. 10-18-33.

See G.C. § 6064-10, which refers to G.C. §§ 24-3 to 24-5.

SEC. 24-4. Receipts deposited, when.

Every state officer, state institution, department, board, commission, college or university, receiving fees or advances of money, or who, under the provisions of section 24 of the General Code, collect or receive fees, advances, or money,

books, accounts, and testimony re-violation under in-
 atumacy, failure, or
 contractor, or subcon-
 any court of common
 of the person, con-
 upon application of
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 order requiring the
 contractor to appear
 ative designated by
 s is ordered, and to
 the matter under in-
 ny failure to obey an
 unished by the court

25-76); 137 v H 1129. Eff

4115.133 [List and subcontractors

ustrial relations shall
 state a list of con-
 whom it finds have
 ted for violations of
 of the Revised Code,
 ; subcontractor shall
 ting directly or in-
 thority for the con-
 ement or from per-
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 ith the secretary of
 public authorities.
 5-76); 137 v H 1129. Eff

of noncompliance;

public authority, or
 has not complied
 5.16 of the Revised
 rial relations shall
 g to such person or
 section 4115.15 of
 t time shall be al-
 with as the director
 ed thirty days from

At the expiration of the time prescribed in such notice, the director of industrial relations shall in writing inform the attorney general of the fact that such notice has been given and that the person, public authority, or prevailing wage coordinator to whom it was directed has not complied with such notice. On receipt thereof, the attorney general shall bring suit in the name of the state in the court of common pleas of the county in which such person, public authority, or prevailing wage coordinator is located to enjoin the awarding of such contract for a public improvement or if the contract has already been awarded to enjoin further work under the contract until the requirements of such notice are complied with.

The court may issue a temporary restraining order without notice to the defendant in such action. Upon final hearing thereof, if the court is satisfied that the requirements of the notice by the director of industrial relations to the defendant was not unreasonable or arbitrary, it shall issue an order enjoining the defendant from awarding such contract for a public improvement or continuing work under the contract until the notice is complied with.

Such injunctions shall continue operative until the court is satisfied that the requirements of such notice have been complied with and the court shall have and exercise with respect to the enforcement of such injunctions all the power invested in it in other similar cases.

Both the plaintiff and defendant in such action have the same rights of appeal as are provided by law in other injunction cases.

*HISTORY: 136 v H 1304 (Eff 8-25-76); 137 v H 1129. Eff 9-25-78.

§ 4115.15 [Failure to pay prevailing wages; work halted.]

Where an investigation by the department of industrial relations reveals that a contractor or subcontractor has failed to pay the prevailing rate of wages, the contracting public authority or the director of industrial relations may, upon written notice to the contractor or subcontractor and the sureties of the contractor or subcontractor, and after hearing held pursuant to section 4115.13 of the Revised Code, order work halted on the part of the contract for which less than the prevailing rate of wages has been paid, until the defaulting contractor has filed with the department a bond in an amount of such penal sum as the department shall set, conditioned upon payment of the prevailing rate of wages.

*HISTORY: 136 v H 1304. Eff 8-25-76.

§ 4115.16 [Complaints of violations; action upon.]

(A) An interested party may file a complaint with the director of industrial relations alleging a violation of sections 4115.03 to 4115.16 of the Revised Code. The director, upon receipt of a complaint, shall investigate pursuant to section 4115.13 of the Revised Code. If the director determines that no violation has occurred, the interested party may appeal the decision to the court of common pleas of the county where the violation is alleged to have occurred.

(B) If the director has not ruled on the merits of the complaint within sixty days after its filing, the interested party may file a complaint in the court of common pleas of the county in which the violation is alleged to have occurred. The complaint may make the contracting public authority a party to the action, but not the director. Contemporaneous with service of the complaint, the interested party shall deliver a copy of the complaint to the director. Upon receipt thereof, the director shall cease investigating or otherwise acting upon the complaint filed with him pursuant to division (A) of this section. The court in which the complaint is filed pursuant to this division shall hear and decide the case, and upon finding that a violation has occurred, shall make such orders as will prevent further violation and afford to injured persons the relief specified under sections 4115.03 to 4115.16 of the Revised Code. The court's finding that a violation has occurred shall have the same consequences as a like determination by the director. The court may order the director to take such action as will prevent further violation and afford to injured persons the remedies specified under sections 4115.03 to 4115.16 of the Revised Code. Upon receipt of any order of the court pursuant to this section, the director shall undertake enforcement action without further investigation or hearings.

(C) The director shall make available to the parties to any appeal or action pursuant to this section all files, documents, affidavits, or other information in the director's possession that pertains to the matter. The rules generally applicable to civil actions in the courts of this state shall govern all appeals or actions under this section. Any determination of a court under this section is subject to appellate review.

(D) Where, pursuant to this section, a court finds a violation of sections 4115.03 to 4115.16 of the Revised Code, the court shall award attorney fees and court costs to the prevailing party. In

report which shall include the names of the committee members serving during the preceding fiscal year, the dates of committee meetings in that year, and any recommendations for changes in sections 4115.31 to 4115.35 of the Revised Code that the committee determines are necessary.

(E) The administrator of the rehabilitation services commission shall designate a subordinate to act as executive secretary to the committee and shall furnish other staff and clerical assistance, office space, and supplies required by the committee.

HISTORY: 136 v S 430, Eff 8-13-76.

Cross-References to Related Sections

See RC §§ 4115.31, 4115.33 to 4115.35 which refer to this section.

§ 4115.33 [Duties of the state committee.]

(A) The state committee for the purchase of products and services of the severely handicapped shall determine the price of all products manufactured and services provided by the severely handicapped and offered for sale to state agencies, political subdivisions, or instrumentalities of the state that the committee determines are suitable for use. The price fixed shall recover for the qualified nonprofit agency for the severely handicapped the cost of raw materials, labor, capital, overhead, and delivery costs, but without profit. The committee shall revise the prices in accordance with changing cost factors and adopt rules regarding specifications, time of delivery, authorizing a central nonprofit corporation to facilitate the distribution of orders among the participating qualified nonprofit agencies, and relevant matters of procedure necessary to carry out the purposes of sections 4115.31 to 4115.35 of the Revised Code.

(B) The committee shall approve a publication provided by the central nonprofit corporation which shall list all products and services produced by any qualified nonprofit agency that the committee determines are suitable for procurement by agencies of this state pursuant to division (A) of this section. This procurement list and revisions thereof shall be distributed to all purchasing officers of state agencies, political subdivisions, and instrumentalities of the state.

(C) The committee shall establish criteria for determining what constitutes a substantial handicap to employment that prevents the individual under the disability from currently engaging in normal competitive employment. In establishing the criteria, the committee shall consult with ap-

propriate entities of government and take into account the views of nongovernmental entities representing the severely handicapped. The committee shall further give weight of the criteria established by the federal committee for purchase of products and services of the blind and other severely handicapped, pursuant to the "Wagner O'Day Act," 52 Stat. 1196 (1938), 41 U.S.C. 46, as amended.

The committee shall, in accordance with the criteria established under this division and by rules adopted in accordance with Chapter 119. of the Revised Code, certify all qualified nonprofit agencies which meet the requirements of division (B) of section 4115.31 of the Revised Code. When a qualified nonprofit agency is certified by the committee, its products and services which the committee determines are suitable for purchase by state agencies and political subdivisions shall be placed on the procurement list established by division (B) of this section.

HISTORY: 136 v S 430, Eff 8-13-76.

Cross-References to Related Sections

See RC §§ 4115.31, 4115.32, 4115.34, 4115.35 which refer to this section.

§ 4115.34 [Procurement list; contractual agreements.]

(A) If any state agency, political subdivision, or instrumentality of the state intends to procure any product or service, it shall determine whether the product or service is on the procurement list published pursuant to section 4115.33 of the Revised Code; and it shall, in accordance with rules of the state committee for the purchase of products and services of the severely handicapped, procure such product or service at the price established by the committee from a qualified nonprofit agency, if the product or service is on the procurement list and is available within the period required by that agency, notwithstanding any law requiring the purchase of products and services on a competitive bid basis. Sections 4115.31 to 4115.35 of the Revised Code do not apply in any cases where the products or services are available for procurement from any state agency, political subdivision, or instrumentality of the state and procurement therefrom is required under any law in effect on the effective date upon original enactment of this section.

(B) The committee and any state agency, political subdivision, or instrumentality of the state may enter into contractual agreements, cooperative working relationships, or other arrangements determined necessary for effective coordi-