



FOLEY & LARDNER LLP

# The Proposed Amendments to the State Prevailing Wage Law

# The Amendments

- Applies to Publicly Funded Private Construction Projects
- Applies to Turnkey Projects
- Lowers the dollar threshold for Public Works
- New Reporting Requirements
- Application to Offsite Prefabrication

# Issues:

- City of Milwaukee vs. State: Differences
- Publicly Funded Private Construction Projects: What is Included?
- Sanctions, Penalties, Fines and Prison
- Determination of Prevailing Wage: Unfair?

# Applies to Publicly Funded Private Construction Projects

- Publicly Funded Private Construction Project is a construction project, other than a project of public works, that receives direct financial assistance from a local governmental unit. (*emphasis added*)
- Local Governmental Unit. Any political subdivision of this state, special purpose district in this state, and instrumentality or corporation of such a political subdivision or special purpose district...

# Financial Assistance

- Any grant, cooperative agreement, loan, contract or any other arrangement by which a local governmental unit provides or otherwise makes available assistance in any of the following forms:

## 1. Funding

# Financial Assistance (cont'd)

2. A transfer or lease of real or personal property of the local governmental unit of any interest in or permission to use, other than on a casual or transient basis, that property for less than fair market value or for reduced consideration
3. Proceeds from a subsequent transfer or lease of real or personal property transferred or leased from the local governmental unit, if the local governmental unit's share of the fair market value of the property is not returned to the local governmental unit

# Financial Assistance (cont'd)

4. A redevelopment contract, economic development agreement, revenue agreement, or contract for Tax Incremental Financing, or with a Redevelopment Authority or assistance from Business Improvement Districts

# Exclusions

- Prevailing Wage will not apply to a publicly funded private construction project that received less than \$1,000,000 in direct financial assistance from a local governmental unit.

# Also Excluded from Prevailing Wage:

- Public Works Projects
- Owner-occupied housing projects supported by affordable housing grants, local housing trust funds or home improvement grants
- Housing projects involving the construction and/or rehab of a residential property limited in size to 4 units or less
- Housing projects without any retail, office or commercial components that seek to increase the supply of affordable housing in a community (*emphasis added*)

# Turnkey Projects

- Applies to any infrastructure project that will be dedicated to public ownership (streets, sewer systems, water mains) whether or not public funds are used (Applies to projects submitted after January 1, 2010)
- Applies to any project that will be purchased, acquired by or dedicated to local units of government or state in lieu of those government units contracting directly
- Intended to codify current rulings

# Public Works

- Lowers threshold from \$48,000 for single trade and \$234,000 for multi-trade (with annual adjustments for construction cost inflation) to a flat \$25,000 without adjustment.

# Reporting Requirements

- Requires contractors, subcontractors or their agents, to submit a certified record of the required employee records in electronic format on a monthly basis to Department of Work Force Development (“DWD”)

# Reporting Requirements (cont'd)

- If an applicable collective bargaining agreement is in place, then only the collective bargaining agreement must be submitted electronically
- DWD is required to post the records on its website, excluding only personally identifiable information

# Prefabrication

- Modifies the exception that provides Prevailing Wage does not apply to offsite employees by expressly applying to employees working at an offsite commercial establishment in Wisconsin on the prefabrication of HVAC, plumbing and piping systems for incorporation into an applicable project.

# Effective Date

- January 1, 2010

# City Prevailing Wage vs. State Prevailing Wage

- City
  - Includes requirements other than Prevailing Wage
  - Applies to a construction project that receives \$1,000,000 or more in direct financial assistance from the City
  - Defines “direct financial assistance” to include the value of below-market land sales, any direct subsidies to developers and city expenditure for private improvements, with a combined value of \$1,000,000 or more, as determined by the Commissioner of the Department of City Development, targeted specifically to a project. It includes the value of tax increment financing and below-market-rate loans provided by the City

# City Prevailing Wage vs. State Prevailing Wage (cont'd)

- Exceptions from \$1,000,000 Threshold:
  - Does not include money allocated for environmental remediation
  - Does not include money allocated for the purchase of public access easements
  - Does not include money allocated for the construction of riverwalks, dockwalls, walkways, plazas, parks, private roadways open to the public or similar improvements
  - Does not include money allocated for public infrastructure improvements.

# City Prevailing Wage vs. State Prevailing Wage (cont'd)

- Does not apply to residential or mixed use projects with a residential component that primarily involves the construction and/or rehab of structures that contain not more than 4 dwelling units
- Does not apply to projects that seek to increase the supply of affordable housing in the City of Milwaukee or projects supported with funds from the Milwaukee housing trust fund.

# City Prevailing Wage vs. State Prevailing Wage (cont'd)

- State Definitions
  - Defines “financial assistance”, but there is no current state definition for “direct financial assistance”.
- State Exceptions:
  - Does not exclude environmental remediation
  - Does not exclude infrastructure, plazas, riverwalks, dockwalls, private roadways
  - Does not exclude affordable housing with any mixed use component
  - Expressly includes public infrastructure

# State Publicly Funded Private Construction Projects:

- New construction and rehab of Low Income Housing Construction Projects with any mixed use component (i.e., first floor retail) receiving financial assistance
- Construction Projects receiving Brownsfield Grants/Loans
- Construction Projects receiving Tax Incremental District Funds, Business Improvement Funds, and Regional Transit Authority Funds
- Projects receiving reimbursement for Riverwalks, Public Plazas, Streets, and Infrastructure (Public and Private)
- Turnkey Projects

# Sanctions/Penalties:

- Liable to employee for unpaid wages, plus an additional equal amount as liquidated damages, plus reasonable attorneys fees
- Fines up to \$200 per day
- Imprisonment for up to 6 months
- Class C misdemeanor
- Class I Felony
- Debarment

# Determination of Prevailing Wage

- Required to request applicable rates from DWD
- Survey: Rate at which majority hours worked in trade in area (500 hours minimum)
- If no such rate: Highest paid 51% of hours worked in trade on projects in area
- Insufficient Data: Area will be gradually enlarged until it includes entire state

# Impacts of Getting Involved

- \$2,000 → \$1,000,000
- Very Limited Exclusions → More Exclusions
- Financial Assistance → Direct Cash Financial Assistance
- Weekly Reporting → Monthly Reporting
- Rules and Regulations