

12 DEPARTMENT OF LABOR

170 BUREAU OF LABOR STANDARDS

Chapter 13: RULES GOVERNING THE ESTABLISHMENT AND USE OF FAIR MINIMUM WAGE RATES ON STATE CONSTRUCTION PROJECTS

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**Summary:** The purpose of this Chapter is to establish definitions and procedures to ensure the consistent and fair administration of the Minimum Wage Rates on State Construction Projects Law as presented in Title 26 MRSA §§ 1304—1315Chapter 15.

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**Section 14: Definitions**

For purposes of the law and these rules, the following words have these meanings:

- A) "Appropriate circumstances", in relation to determination of a statewide market for a trade, means conditions of the labor market for the trade are such that a local or area rate cannot be determined using the procedure in Section IV (A)-(B).
- B) "Benefits" means payments, other than wages, made to a worker or to a defined contribution plan or other third party on behalf of the worker. Benefits includes, but is not limited to, health and welfare contributions, pension, individual retirement account or other retirement contributions, vacation and other accumulated leave, *per diem* in lieu of wages, and registered apprenticeship training and education. Benefits does not include any payments required by law or provision of goods or services primarily for the benefit or convenience of the employer, such as general training or use of a company vehicle for work-related use.
- C) "Board" means the Minimum Wage Rate on Construction Projects Board as established in Title 26 MRSA §1307-A and constituted in this chapter.
- D) "Bureau" means the Bureau of Labor Standards within the Department of Labor.
- E) "Contractor" means an owner, executive, or manager of a company performing work in the construction industry.
- F) "Days", as used in conjunction with the appellate process, means business days as scheduled by the Bureau.
- G) "Director" means the Director of the Bureau of Labor Standards.
- H) "Filing date" means the day on which the official wage determination is sent to received by the requesting public agency or its representative by mail, facsimile, or other electronic transmission.
- I) "Like construction" means the categories of construction as enumerated in Section III. In establishing these categories the Bureau will use the North American Industry

Classification System (NAICS) ~~system~~ adopted by the U. S. Office of Management and Budget in ~~2002~~2017 including an addendum by the U.S. Bureau of Labor Statistics called the "BLS-Only NAICS Codes" that adds residential and non-residential categories for the specialty trades in NAICS group 238. The Bureau may combine classifications at different levels based on Davis-Bacon usage, advice of the Board, and accepted opinions of other experts in the field.

- J) "*Per diem* in lieu of wages" means payments to a worker to cover personal expenses, that include, but are not limited to, meals, travel, and lodging, where the employer does not require a receipt or other documentation of actual expenses incurred by the worker.
- K) "Registered Apprentice" means a person who is employed in a craft recognized as an apprenticeable trade and is registered by the Bureau of Apprenticeship and Training of the U.S. Department of Labor as employed in accordance with the standards established by that Bureau, or is registered by the Bureau of Employment Services of the Maine Department of Labor and is employed in accordance with its standards. Registered Apprentice does not include the holder of an apprentice license as issued by the Maine Department of Professional and Financial Regulation.
- L) The term "~~2nd and 3rd week of September~~ July" means the 14 calendar-day period ~~beginning the Sunday after Labor Day starting Sunday of the second full week in July. A full week runs from Sunday through Saturday. The period will start no earlier than July 8<sup>th</sup> nor no later than July 14<sup>th</sup>.~~
- M) "Temporary or emergency repairs" means construction activities that must be undertaken immediately upon discovery of the problem or the occurrence of the incident that caused the damage so as to prevent further damage or because the damage poses a threat to health and safety.
- N) "Trade" means a construction work activity engaged in by an individual worker. In establishing trade definitions the Bureau will be guided by the ~~Dictionary of Occupational Titles as published by the U. S. Department of Labor, Employment and Training Administration, revised in 1991~~ Standard Occupational Classification Manual, version 2018, published by the US Office of Management and Budget. The Bureau may also be guided by Davis-Bacon usage, advice of the Board, and accepted opinions of other experts in the field.
- O) "Wages" means payment(s) to the worker for work performed and includes bonuses and other payments based on work performance in accordance with Bureau and U. S. Department of Labor interpretations.
- P) "Worker" means a person engaged in a construction trade that is eligible for coverage under a wage determination. It includes a work leader with some supervisory responsibility but whose primary responsibility is trades work. It excludes owner-operators who qualify as bona fide independent contractors.

## **Section II: Board of Minimum Wage Rates on Construction Projects**

- A) The Board will consist of eight members to be appointed by the Director as follows:

- 1) A worker, not covered by a collective bargaining agreement, engaged in a building construction trade;
  - 2) A worker, covered by a collective bargaining agreement, engaged in a building construction trade or the representative of a union covering a building construction trade;
  - 3) A worker, not covered by a collective bargaining agreement, engaged in a highway or heavy and bridge construction trade;
  - 4) A worker, covered by a collective bargaining agreement, engaged in a highway or heavy and bridge construction trade or the representative of a union covering a highway or heavy and bridge construction trade;
  - 5) A building contractor that is not a signatory to a collective bargaining agreement;
  - 6) A building contractor that is a signatory to a collective bargaining agreement;
  - 7) A highway or heavy and bridge contractor that is not a signatory to a collective bargaining agreement; and
  - 8) A highway or heavy and bridge contractor that is a signatory to a collective bargaining agreement.
- B) The Director serves as chair of the Board. The Director may designate a person from the Bureau staff to preside as chair in the Director's absence.
- C) The Director ~~shall~~ may designate a person from the Bureau staff to serve as Secretary to the Board.
- D) ~~The Director shall call a minimum of two meetings a year.~~ The Director ~~may~~ shall call ~~additional~~ meetings as he or she deems necessary. The Director or his or her designee will set the agenda for each meeting.
- E) The Board will provide advice through discussion and consensus.

### **Section III: Construction Industry Classification**

- A) Classification for purposes of survey response and wage determination must be done at the project level. Classification for the purpose of inclusion in the mailed survey will be based on the NAICS code assigned to the individual businesses from the cooperative program between the Maine Department of Labor and the U.S. Bureau of Labor Statistics called the Quarterly Census of Employment and Wages.
- B) There will be three industry classifications: Building Construction, Highway Construction and Earthwork, and Heavy and Bridge Construction. Building Construction will be subdivided into two subcategories as described below.
- C) Building Construction will include those construction activities listed in NAICS 236 Construction of Buildings;

- 1) The Building I subcategory will include the construction of single and two-family homes.
  - 2) The Building II subcategory will include the construction of all other buildings and structures in NAICS 236 not otherwise classified in (1) above.
- D) Highway Construction and Earthwork will include those construction activities listed in NAICS 2372 Land Subdivision and 2373 Highway, Street, and Bridge Construction, except that the construction of bridges, elevated highways and overpasses will be included in Heavy and Bridge Construction ((E) below), and those activities from other codes within NAICS 237 Heavy and Civil Engineering Construction listed below:
- |   |                                      |
|---|--------------------------------------|
| athletic fields   | land reclamation                     |
| bridle paths  | manholes                             |
| brush clearing and cutting                              | pond construction                    |
| drainage, not in conjunction with other construction    | tennis court construction (outdoors) |
| earthmoving, not in conjunction with other construction | trail building                       |
| golf courses  | trailer parks/campgrounds            |
- E) Heavy and Bridge Construction will include those construction activities in NAICS 237, except those listed in (D) above.
- F) Construction activities listed in NAICS 238 Specialty Trade Contractors will be classified based on the classification of the project on which the work is being performed (e. g. workers employed by an electrical contractor, NAICS 23821, working on a building project would be classified in Building. If working on a sewerage treatment plant project these same workers would be classified in Heavy and Bridge). For the purpose of determining which businesses in this group are mailed the survey, the “BLS-Only NAICS Codes” definitions classify businesses as either residential which will be Building I or non-residential which will be Building II.
- G) If, during the two-week period, a worker is employed on two or more projects that could be classified in different industries, the worker must be reported in the industry in which the worker worked the greatest number of hours. If this cannot be determined, the worker will be reported as working in the primary industry of the company.
- H) The individual businesses classified as performing the work in the Building I subcategory will not be included in the mailed survey. For projects in the Building I category the Bureau will use the Building II rates.
- I) The Bureau may develop methods to exclude construction businesses from the survey that are likely to employ fewer than 5 craft workers.

#### Section IV: Determining Locality

- A) The locality for purposes of a wage determination will be the county where the construction will be performed and all immediately adjacent counties, provided that at least two-thirds of the wage rates can be based on data from this area.

- 1) To establish a prevailing wage rate for a trade there must be 10 or more workers in that trade.
- B) If the above does not result in at least two-thirds of the wage rates being based on data from this area, counties adjacent to this area will be added, starting with the county with the greatest construction industry employment, until the two-thirds standard is met.
- C) Trades for which a determination cannot be made using the above method are presumed to have a statewide market and will have a determination made based on data from all employers in that industry.
- D) If, during the two-week period, a worker is employed on two or more projects in the industry selected in accordance with Section III, the worker must be reported at the site on which the worker worked the greatest number of hours. If this cannot be determined, the worker will be reported as if working at the company location where he or she regularly reports.

#### **Section V: Wage Calculation and Reporting**

- A) An employer shall report on the survey an hourly wage on all workers that worked during the two-week period. An individual worker should only be reported once at the site determined according to Section IV (D).
- B) Bonuses and other wage payments not based on an hourly rate must be converted to an hourly rate and added into the regular hourly rate. The amount of the bonus or other wage payment must be divided by the hours the worker worked during the period covered by the bonus or other wage payment (e.g., an annual bonus must be divided by the total hours worked during the year by the worker receiving the bonus).
- C) If, during the two-week period, a worker receives pay at two or more rates on the project in the industry selected in accordance with Section III, the rate at which the worker worked the most time must be reported. If this cannot be determined, the highest rate the worker was paid for work on the selected project must be reported.

#### **Section VI: Benefit Calculation and Reporting**

- A) An employer shall report on the survey an hourly benefit rate on all workers that worked during the two-week period and received a benefit. An individual worker should only be reported once at the site determined in accordance with Section IV (D) and at the benefit rate associated with the pay rate selected in accordance with Section V.
- B) Benefits not paid or valued on an hourly rate must be converted to and reported as an hourly rate. The conversion will be accomplished using the following formula:

$(C/H) \times F = \text{Hourly Benefit Rate}$ , where

C equals the cost or value of the benefit for some period

H equals the yearly hours worked by the worker

F is the time period adjustment factor;  
 If C is the annual cost, F equals 1,  
 If C is the quarterly cost, F equals 4,  
 If C is the monthly cost, F equals 12,  
 If C is the biweekly cost, F equals 26,  
 If C is the weekly cost, F equals 52.

- C) If, during the two-week period, a worker receives benefits at two or more rates at the benefit rate associated with the pay rate selected in accordance with Section V, the rate at which the worker worked the most time must be reported. If this cannot be determined, the highest rate the worker was paid for work during the period must be reported.

### **Section VII: Wage and Benefit Relationship**

- A) The median rates for wages and for benefits will be determined separately.
- B) A contractor shall pay each worker on a covered project at least the prevailing hourly wage rate, as determined by the Bureau for that project, for the trade(s) within the construction industry category or categories in which the worker is employed.
- C) A contractor shall provide benefits to each worker on a covered project at least at the prevailing hourly benefit rate as determined by the Bureau for that project for the trade(s) within the construction industry category or categories in which the worker is employed.
- D) A contractor may comply with the requirement in (C) if the contractor is in compliance with (B) and the total of the hourly wages and benefits paid by the contractor is equal to or exceeds the total of the prevailing hourly wage and benefit rates as determined by the Bureau for that project for the trade(s) in which the worker is employed.
- E) Records of employee benefits paid shall be recorded on a per hour basis as presented in Section VI~~4~~.

### **Section VIII: Rate Determination**

- A) The Wage and Benefit minimum rates will remain paired and a total provided.
- B) In choosing the higher of the rates for trades within their respective locality and construction groups, the following criteria will be used:
- 1) Locally set rates will be selected over all the others;
  - 2) Statewide "Like Construction" rates will be next selected;
  - 3) All construction rates will be last selected;
  - 4) Rates with under 10 workers in the trade in the group will not be selected.
- C) In the event that the total of the wages and benefits are the same for the two surveys and are set at the same criteria in B, the one with a higher median wage will be selected.

### **Section IXVIII: Issuance of Determinations**

- A) Requests for determinations must use the process and web page specified ~~be filed on forms provided~~ by the Bureau.
- B) If a wage determination request involves construction from more than one category of construction, the Bureau must issue separate determinations for each category where the estimated cost of that part of the construction exceeds \$50,000.
- C) A public agency or its representative must include a statement in any bid notice that the project is covered by a wage determination. The bid package must contain the wage determination(s) for the project. The contract with the winning bidder must include the wage determination(s) and a provision that the contractor will provide the wage determination(s) to all subcontractors.
- D) A copy of the determination(s) for a project must be kept posted at the work site by the contractor and by all subcontractors at a prominent location, easily accessible by their workers.
  - 1) On a project where there is no such location (e. g. a rural road resurfacing project) a contractor or subcontractor may comply with this requirement by providing each worker with a copy of the wage determination within the first full day that the worker works on that project. The contractor or subcontractor must be able to document that each worker has received a copy of the wage determination.

#### **Section IX: Enforcement**

- A) Enforcement of these rules and the laws upon which the rules are based will be the responsibility of the Bureau of Labor Standards, under the direction of the Director.
- B) Each contractor and sub-contractor shall have payroll records available to a Bureau representative on each site covered by a wage determination. The records must be current to within three days of the latest pay period that was paid by the contractor or sub-contractor. These records must be retained, preserved, and open to inspection by the Bureau for at least three years following the completion of the project. 1) A contractor or subcontractor may comply with this provision by keeping the records for a site at a location within 10 miles of the site.
- C) The records must, at a minimum, contain the name, trade or job title, hourly wage rate, benefit rate(s), total wages paid, and total benefit(s). paid for each of that employer's workers that worked on the site, for each payroll period.
- D) The trade listed on these records is not binding on the Bureau. The trade for which a worker should be paid may be determined through interviews with the affected worker(s), any co-workers, or any supervisors who are working or have worked on the site.
- E) Each day a worker is not paid in accordance with the law and these rules, is a separate violation.

#### **Section XI: Effect of Rules**

These rules will be effective five days after filing with the Secretary of State and will govern the ~~2007~~ 2022 and subsequent surveys and any prevailing wage and benefit determinations based on those surveys. These rules will not control in any way any survey conducted prior to the ~~2007~~ 2022 survey, the use of any data from such surveys, nor any prevailing wage and benefit determinations based on such surveys.

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STATUTORY AUTHORITY: 26 MRSA §§ 42 ~~and 1304-1315~~

EFFECTIVE DATE:

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