Published on *The National Law Review* https://natlawreview.com

The Illinois Prevailing Wage Act Can Lead to Costly Liability

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All companies receiving public funds, not just those in the construction industry, need to be aware of how the Illinois Department of Labor (IDOL) is enforcing the Illinois Prevailing Wage Act (IPWA). The IPWA is a statute that was initially enacted more than 70 years ago, and over the years has allowed those in the construction trades to be paid no less than the general prevailing rate of wages (consisting of hourly cash wages plus fringe benefits) for work of a similar character in the county where the work is performed when working for public bodies on public projects (these rates are set by the IDOL). However, as a result of various recent amendments to the IPWA, as well as recent decisions by Illinois courts, the IDOL is significantly expanding the reach of the IPWA in a way that affects private companies on private projects. As a result, companies who have no knowledge of the IPWA may find themselves exposed to liability that they never knew existed.

In general, the **IPWA requires "public bodies" to pay prevailing wages** to all laborers, workers and mechanics engaged in "public works." "Public body" is defined to include "any institution supported in whole or in part by public funds". "Public works" is defined as all projects financed in whole or in part through bonds, grants, loans or other funds made available by or through the state or any of its political subdivisions. The failure to pay prevailing wage can result in liability equivalent to the **difference between what the laborers were paid and what they should have been paid** under the prevailing wage.

Many people assume that the terms ""public bodies" and "public works" only apply to projects that are for the benefit of the public and performed on behalf of a governmental entity. However, making such an assumption could result in exposure for violation of the IPWA.

In fact, these assumptions were rejected by the Third District of the Illinois Appellate Court in *Department of Labor v. Sackville Construction Inc.*, 402 Ill. App. 3d 195 (3rd Dist. 2010). In *Sackville*, a private developer entered into a contract with a general contractor to construct a 45,000-square-foot industrial complex on a vacant lot in Rock Island, Illinois. Thereafter, the developer entered into an agreement with the City of Rock Island to construct the building. As part of the agreement, the developer agreed to invest $1.5 million into the project. In return, the City of Rock Island conveyed title to the property to the developer for $1, and agreed to contribute $150,000 for site construction.

The general contractor entered into a subcontract with Sackville to provide laborers for the project. The laborers were not paid prevailing wage. After receiving a complaint that Sackville had not paid its laborers the prevailing wage, the IDOL filed suit against Sackville for violation of the IPWA. Although the trial court found in favor of Sackville, the appellate court reversed. The appellate court held that looking at the language of the statute, the phrase “an institution supported in whole or in part by public funds” was broad enough to allow a private developer to be classified as a “public body” under the statute. Thus, Sackville was found to be a “public body” and the private development project was found to be a “public work” because the developer received public funds for the development.

Importantly, while it is true that it was the subcontractor that got sued by the IDOL in the *Sackville* case, that does not necessarily mean that the developer under such circumstances is without exposure. We have seen subcontractors in such cases file third-party complaints against the entity that would be in the position of the developer.

For example, a company entered into an agreement with a village in Illinois whereby the village would agree to rebate a percentage of the sales taxes generated by the business in exchange for the company agreeing to construct its new building in the village. The company retained a general contractor to build the new building, and the general contractor hired subcontractors to perform the work. At the time that the parties entered into the various construction agreements, none of them considered whether the IPWA applied. The IDOL thereafter sued the subcontractors for failure to pay their employees the prevailing wage based on the IDOL’s theory that the subcontractors were public bodies and the construction of the building was a public work.

The subcontractors then filed third-party claims against the company asserting that the company acted improperly in not informing the subcontractors that the IPWA applied to the construction of the building. (The IWPA expressly requires this type of notice.) As a result, the company is now forced to litigate the question of whether the IPWA was applicable to the construction of the new building because the company is receiving funds under the sale tax rebate agreement. The company is now at risk for liability if the court determines that the IPWA applied to the construction.

While the company in that case was not sued by the IDOL for violation of the IPWA, such a suit is a real possibility. The IPWA requires the “public body” to include in the project specifications and the contract “a stipulation to the effect that not less than the prevailing rate of wages as found by the public body or Department of Labor or determined by the court on review shall be paid to all laborers, workers and mechanics performing work under the contract.” The IPWA provides that a failure to include this notice subjects the public body liability for any interest, penalties or fines that would have been owed by the contractor if proper written notice were provided.

National Law Review, Volume IV, Number 275