

**DEPARTMENT OF LABOR  
DIVISION OF INDUSTRIAL AFFAIRS  
OFFICE OF LABOR LAW ENFORCEMENT**

Statutory Authority: 29 Delaware Code, Section 8503(7) and 19 Delaware Code, Section 105(a)(8)  
(29 **Del.C.** §8503(7) & 19 **Del.C.** §105(a)(8))  
19 **DE Admin. Code** 1322

**PROPOSED**

**PUBLIC NOTICE**

**1322 Prevailing Wage Regulations**

The State of Delaware, Department of Labor's Division of Industrial Affairs ("the Division") hereby gives notice of its intention to adopt amended regulations.

**HOW TO COMMENT ON THE PROPOSED REGULATION**

In May 2018 the Department proposed amendments to regulations for the Prevailing Wage Law. The Department received public comment at a hearing held on May 21, 2018 and additional commentary in the form of written suggestions. The Department has not proceeded with final promulgation of the amendments and now seeks to add additional amendments to the regulations.

The Department solicits, and will consider, timely filed written comments from interested individuals and groups concerning these proposed amended regulations. The deadline for the filing of such written comments will be fifteen (15) days after the public hearing is held on these regulations on September 24, 2018 from 4:00 to 6:00 pm and will be held at:

**Delaware Department of Labor/Fox Valley  
Annex/Harold Stafford Training Center  
19 E. Lea Blvd  
Wilmington, DE 19802**

Members of the public may receive a copy of the proposed regulation at no charge by United States Mail by writing or calling Julie Petroff, Division of Industrial Affairs, Delaware Department of Labor, 4425 North Market Street, Wilmington Delaware 19802, telephone number 302-761-8175. Members of the public may present written comments on the proposed regulation by submitting such written comments to Ms. Petroff at the address of the Delaware Department of Labor as set forth above. The deadline for the filing written comments will be the latter of thirty (30) days after these proposed amended regulations are promulgated in the Delaware *Register of Regulations*, or fifteen (15) days after the public hearing, which, in this case, is October 9, 2018.

**NATURE OF PROCEEDINGS; SYNOPSIS OF THE SUBJECT AND SUBSTANCE OF THE PROPOSED REGULATION**

The Department of Labor proposes to amend its regulations for the Prevailing Wage Law as described in 29 **Del.C.** §6960. The proposed amendments will limit the number of fringe benefits deductions the Department will recognize; expand the scope of the circumstances under which the Department shall hold administrative hearings; and make minor changes to the conduct of those hearings themselves. The proposed amendments will also add a Diver Classification and will include that Classification in the Classification booklet.

**STATUTORY BASIS AND LEGAL AUTHORITY TO ACT**

29 Delaware Code, §8503(7); 19 Delaware Code, §105(a)(8).

**OTHER REGULATIONS AFFECTED**

None.

**1322 Prevailing Wage Regulations**

Pursuant to 29 **Del.C.** §8503(7), the Department of Labor, State of Delaware, hereby promulgates the following rules and regulations to implement the provisions of 29 **Del.C.** §6960, "Wage provisions in public construction contracts." These regulations supersede Regulations PW101, entitled "Regulations Concerning Apprentices and Supportive Service Program

Trainees Employed on State Projects" (adopted April 11, 1978 and repealed April 5, 1992) and "Delaware Prevailing Wage Regulations" (adopted April 5, 1992 as amended September 15, 1993).

## 1 DE Reg. 519 (11/01/97)

### 1.0 Introduction

The prevailing wage law states that the specifications for every contract or aggregate of contracts relating to a public works project in excess of \$500,000 for new construction (including painting and decorating) or \$45,000 for alteration, repair, renovation, rehabilitation, demolition or reconstruction (including painting and decorating of building or works) to which this State or any subdivision thereof is a party and for which the State appropriated any part of the funds and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Delaware Department of Labor, Division of Industrial Affairs, to be prevailing in the county in which the work is to be performed.

## 19 DE Reg. 415 (11/01/15)

### 2.0 Administration

The prevailing wage law assigns to the Department of Labor the responsibility for predetermining wage rates prevailing for the corresponding classes of laborers and mechanics employed on projects similar to the contract work in the counties where the work is to be performed. The Secretary of Labor has delegated the prescribed functions of the Department to the Administrator of the Office of Labor Law Enforcement of the Division of Industrial Affairs. The Office of Labor Law Enforcement has responsibility for enforcing and determining the prevailing rates, and ensuring that prevailing wages are paid in accordance with the provisions of the law.

Enforcement responsibility includes the conducting of investigations regarding compliance with the law; settling, adjusting and adjudicating, by informal means, cases involving the payment of prevailing wages; coordinating the enforcement activities of the various State agencies having contract compliance and enforcement responsibilities; requiring the withholding of payments to employers who have failed to pay prevailing wages; and recommending the commencement of legal proceedings against those failing to comply with the law.

### 3.0 Concepts and Definitions

3.1 This section presents definitions and explanations to provide a basic understanding of elements inherent in collecting wage data and issuing wage determinations, and enforcing prevailing rates.

3.1.1 Activity Covered. 29 Del.C. §6960 The prevailing wage law applies to every contract or aggregate of contracts relating to a public works project in excess of \$500,000 for new construction (including painting or decorating) or \$45,000 for alteration, repair, renovation, rehabilitation, demolition or reconstruction (including painting and decorating of building or works) to which this State or any subdivision thereof is a party and for which the State appropriated any part of the funds and which requires or involves the employment of mechanics and/or laborers.

3.1.2 "**Building**" or "**Work**". The terms "**building**" or "**work**" generally include construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work. The terms include without limitation, buildings, structures, and improvements of all types, such as bridges, dams, plants, highways, parkways, streets, tunnels, sewers, mains, power lines, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, buoys, jetties, breakwaters, levees, canals, dredging, shoring, rehabilitation and reactivation of plants, scaffolding, drilling, blasting, excavating, clearing, and landscaping. The manufacture or furnishing of materials, articles, supplies or equipment is not a "building" or "work" within the meaning of the regulations unless conducted at the site of such a building or work.

3.1.3 Laborers and Mechanics. The terms "**laborer**" and "**mechanic**" includes at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial. The term "laborer" or "mechanic" includes apprentices and Supportive Service Program (SSP) trainees. The term does not apply to workers whose duties are primarily administrative, executive, or clerical, rather than manual. Persons employed in a bona fide executive, administrative, or professional capacity are not deemed to be laborers or mechanics. Working foremen who devote more than twenty (20) percent of their time during a workweek to mechanic or laborer duties are deemed to be laborers and mechanics for the time so spent.

The terms "**laborers**" and "**mechanics**" do not apply to watchmen, guards, dispatchers, or weighmasters. The following classifications of workers are recognized by the Department:

- Asbestos Workers
- Boilermakers

Bricklayers  
Carpenters  
Cement Finishers  
Diver  
Diver Tender  
Electrical Line Worker  
Electricians  
Elevator Constructors  
Glaziers  
Insulators  
Iron Workers  
Laborers  
Millwrights  
Painters  
Pile Driver  
Plasterers  
Plumbers/Pipefitters/Steamfitters  
Power Equipment Operators  
Roofer- Composition  
Roofer - Shingle, Slate and Tile  
Sheet Metal Workers  
Soft Floor Layers  
Sprinkler Fitters  
Terrazzo/Marble/Tile Setters  
Terrazzo/Marble/Tile Finishers  
Truck Drivers

Definitions for each classification are contained in a separate document entitled, "Classifications of Workers Under Delaware's Prevailing Wage Law." Workers shall be classified by the Department of Labor. Classification determinations shall be recorded by the Department as they are made.

Laborers and mechanics are to be paid the appropriate wage rates for the classification of work actually performed, without regard to skill.

#### 3.1.4 Apprentices and Supportive Service Program Trainees.

##### 3.1.4.1 Definitions. As used in this section:

3.1.4.1.1 The term "**apprentice**" means persons who are indentured and employed in a bona fide apprenticeship program and individually registered ~~by the program sponsor~~ with the Delaware Department of Labor.

3.1.4.1.2 The term "**apprenticeship agreement**" means a written agreement between an apprentice and either his/her employer or a joint apprenticeship committee which contains the terms and conditions of the employment and training of the apprentice.

3.1.4.1.3 The term "**apprenticeship program**" means a complete plan of terms and conditions for the employment and training of apprentices.

3.1.4.1.4 The term "**Joint apprenticeship committee**" means a local committee equally representative of employers and employees which has been established by a group of employers with a bona fide bargaining agent or agents to direct the training of apprentices with whom it has made agreements.

3.1.4.1.5 The term "**registration**" means the approval by the Department of Labor of an apprenticeship program or agreement as meeting the basic standards adopted by the Bureau of Apprenticeship and Training, United States Department of Labor. The term "**registration**" for SSP Trainees means the individual registration of a participant in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration.

3.1.4.1.6 The term "**SSP Trainee**" or "**trainee**" means a participant in the "Supportive Service Program" mandated by the Federal Highway Administration for federally aided state highway projects.

##### 3.1.4.2 Employment of Apprentices and SSP Trainees on State Projects.

- 3.1.4.2.1 Apprentices and SSP Trainees will be permitted to work as such on State contracts in excess of ~~\$400,000~~ \$500,000 for new construction or ~~\$45,000~~ \$45,000 for alteration, repair, renovation, rehabilitation, demolition or reconstruction only when they are registered with the Department of Labor or an approved SSP Training Program.
- 3.1.4.2.2 The mechanic's rate on all such State contracts is that rate determined by the Department of Labor. The percentage of the mechanic's rate that the registered apprentice or SSP Trainee receives will be the percentage that the apprentice or trainee qualifies for under the terms of the individual's formal Apprenticeship/Trainee agreement.
- 3.1.4.2.3 Any person employed at an apprentice or trainee wage rate who is not registered as above, shall be paid the wage rate determined by the Department of Labor for the classification of work (s)he actually performed.
- 3.1.4.2.4 The ratio of apprentices to mechanics on the site of any work covered by 29 **Del.C.** §6960 in any craft classification may not be greater than the ratio permitted to the contractor for the entire workforce under the registered apprenticeship program. Any apprentice performing work on the job site in excess of the ratio permitted under the registered program must be paid not less than the wage rate that the applicable wage determination specifies for the work (s)he actually performs. Entitlement to mechanic's wages shall be based upon seniority in the apprenticeship program or (in the case of equal seniority) seniority on the job site.
- 3.1.4.3 Records.
  - 3.1.4.3.1 Every employer who employs an apprentice or SSP trainee under this part must keep the records required by 19 **Del.C.** Chs. 9 and 11, including designation of apprentices or trainees on the payroll. In addition, every employer who employs apprentices or SSP trainees shall preserve the agreements under which the individuals were employed.
  - 3.1.4.3.2 Every joint apprenticeship committee or SSP Program sponsor shall keep a record of the cumulative amount of work experience gained by the apprentice or trainee.
  - 3.1.4.3.3 Every joint apprenticeship committee shall keep a list of the employers to whom the apprentice was assigned and the period of time (s)he worked for each. Every SSP Program sponsor shall keep a list of the projects to which the trainee was assigned and the period of time (s)he worked on each.
  - 3.1.4.3.4 The records required by sections 3.1.4.3.1, 3.1.4.3.2, and 3.1.4.3.3 shall be maintained and preserved for at least three (3) years from the termination of the apprenticeship or training period. Such records shall be kept safe and accessible at the place or places of employment or at a central location where such records are customarily maintained. All records shall be available at any time for inspection and copying by the Department of Labor.
- 3.1.5 Working Foremen. 29 **Del.C.** §6960 does not apply to (and therefore survey data are not collected for) workers whose duties are primarily administrative, executive or clerical, rather than manual. However, working foremen who devote more than twenty (20) percent of their time during a workweek to mechanic or laborer duties are laborers and mechanics for the time so spent and data will be collected for the hours spent as laborers or mechanics.
- 3.1.6 Helpers. Helper classifications are not recognized by the Department of Labor. All laborers and mechanics are to be paid the appropriate wage rate for the classification of work actually performed, without regard to skill.
- 3.1.7 Construction Projects. In the wage determination process, the term "project" refers to construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work away from the site of the work and consists of all construction necessary to complete a facility regardless of the number of contracts involved so long as all contracts awarded are closely related in the purpose, time and place. For example, demolition or site clearing work preparatory to construction is considered a part of the project.
  - 3.1.7.1 Character Similar. 29 **Del.C.** §6960 requires the predetermination of wage rates which are prevailing on projects of a "character similar to the construction work." As a general rule, the Department identifies projects by end use type and classifies them into three major categories:
    - 3.1.7.1.1 Building Construction. Building construction generally is the construction of sheltered enclosures with walk-in access for the purpose of housing persons, machinery, equipment, or supplies. It includes all construction of such structures, the installation of utilities and the installation of equipment, both above and below grade level as well as incidental grading, utilities and paving. Additionally, such structures need not be "habitable" to be building construction. The installation of heavy machinery and/or equipment shall not change the project's character as a building. Examples: Alterations and additions to nonresidential

buildings; Apartment buildings (5 stories and above); Arenas (enclosed); Auditoriums; Automobile parking garages; Banks and financial buildings; Barracks; Churches; Hospitals; Hotels; Industrial buildings; Institutional buildings; Libraries; Mausoleums; Motels; Museums; Nursing and convalescent facilities; Office buildings; Outpatient clinics; Passenger and freight terminal buildings; Police stations; Post offices; City halls; Civic centers; Commercial buildings; Court houses; Detention facilities; Dormitories; Farm buildings; Fire stations; Power plants; Prefabricated buildings; Remodeling buildings; Renovating buildings; Repairing buildings; Restaurants; Schools; Service stations; Shopping centers; Stores; Subway stations; Theaters; Warehouses; Water and sewage treatment plants (building only).

- 3.1.7.1.2 Heavy Construction. Heavy projects are those that are not properly classified as either "building" or "highway". Unlike these classifications, heavy construction is not a homogeneous classification. Examples of Heavy construction: Antenna towers; Bridges (major bridges designed for commercial navigation); Breakwaters; Caissons (other than building or highway); Canals; Channels; Channel cut-offs; Chemical complexes or facilities (other than buildings); Cofferdams; Coke ovens; Dams; Demolition (not incidental to construction); Dikes; Docks; Drainage projects; Dredging projects; Electrification projects (outdoor); Flood control projects; Industrial incinerators (other than building); Irrigation projects; Jetties; Kilns; Land drainage (not incidental to other construction); Land leveling (not incidental to other construction); Land reclamation; Levees; Locks, Waterways; oil refineries; Pipe lines; Ponds; Pumping stations (pre-fabricated drop-in units); Railroad construction; Reservoirs; Revetments; Sewage collection and disposal lines; Sewers (sanitary, storm, etc.); Shoreline maintenance; Ski tows; Storage tanks; swimming pools (outdoor); Subways (other than buildings); Tipples; Tunnels; Unsheltered piers and wharves; Viaducts (other than highway); Water mains; Waterway construction; Water supply lines (not incidental to building); Water and sewage treatment plants (other than buildings); Wells.
- 3.1.7.1.3 Highway Construction. Highway projects include the construction, alteration or repair of roads, streets, highways, runways, taxiways, alleys, trails, paths, parking areas, greenway projects and other similar projects not incidental to building or heavy construction. Examples: Alleys; Base courses; Bituminous treatments; Bridle paths; Concrete pavement; Curbs; Excavation and embankment (for road construction); Fencing (highway); Grade crossing elimination (overpasses or underpasses); Parking lots; Parkways; Resurfacing streets and highways; Roadbeds; Roadways; Shoulders; Stabilizing courses; Storm sewers incidental to road construction; Street Paving; Guard rails on highway; Highway signs; Highway bridges (overpasses; underpasses; grade separation); Medians; Surface courses; Taxiways; Trails.
- 3.1.7.1.4 Multiple Categories. In some cases a project includes construction items that in themselves encompass different categories of construction. Generally, a project is considered mixed and a "multiple schedule" used if the construction items are substantial in relation to project cost, i.e. more than twenty (20) percent. Only one schedule is used if construction items are "incidental" in function to the overall character of a project (e.g., paving of parking lots or an access road on a building project), and if there is not a substantial amount of construction in the second category.
- 3.1.7.2 Site of Work. A basic characteristic of the construction industry is the continual shift in the site of employment. 29 **Del.C.** §6960 provides that prevailing wages are to be paid to "...all mechanics and laborers employed directly upon the site of the work..." (emphasis added). The site of the work is limited to the physical place or places where the construction called for in the contract will remain when work on it has been completed.
- 3.1.8 Prevailing Wage Rates. Every contract and the specifications for every contract to which section 6960 applies are required to contain a provision stating the minimum wages to be paid various classes of laborers and mechanics. These rates are to be based upon the wages that the Department of Labor determines to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the county in which the work is to be performed, as reported in the Department's annual prevailing wage survey.
- The prevailing wage shall be the wage paid to a majority of employees performing similar work as reported in the Department's annual prevailing wage survey or, in the absence of a majority, the weighted average wage paid to all employees reported.
- 3.1.9 Wages. The term "**wages**" means the basic hourly rate of pay plus fringe benefits as defined below.
- 3.1.10 Fringe Benefits.

3.1.10.1 Fringe benefits may be considered in determining whether an employer has met his/her prevailing wage obligations. As a general rule, any fringe benefit may be considered as long as the employer is not legally required to provide it. Therefore, benefits such as health, welfare or retirement benefits, vacation, holiday pay or sick leave pay could be considered fringe benefits. Employer payments for unemployment insurance, workers' compensation, FICA, etc. (which are required by law) would not be considered fringe benefits. To be considered a "bona fide" fringe benefit for purposes of the Act, a fringe benefit plan, fund, or program must constitute a legally enforceable obligation which meets the following criteria:

In order to be considered a valid fringe benefit, payments must be made either in cash, or contributed to an irrevocable escrow account at least once each month.

**"Irrevocable"** means that the benefit may not be forfeited. However, a benefit plan can be considered by the Department provided that payments to the plan are made irrevocably by the employer, even though certain employees may forfeit their individual rights to the benefits under certain prescribed conditions. Thus, if payments are made by the employer, and no return of those payments is possible, the plan would be acceptable, even though individual employees might not receive the benefits under certain situations. Benefits forfeited by such employees remain in an escrow account for the use of the other employees.

3.1.10.1.1 The provisions of a plan, fund, or program adopted by the contractor, or by contract as a result of collective bargaining, must be specified in writing, and must be communicated in writing to the affected employees. Contributions must be made pursuant to the terms of such plan, fund, or program. The plan may be either contractor-financed or a joint contractor-employee contributory plan. For example, employer contributions to Individual Retirement Accounts (IRAs) approved by IRS are permissible. However, any contributions made by employees must be voluntary. No contribution toward fringe benefits made by the employees themselves, or fringe benefits provided from monies deducted from the employee's wages may be included or used by an employer in satisfying any part of any fringe benefit obligation under the Act.

3.1.10.1.2 The primary purpose of the plan must be to provide systematically for the payment of benefits to employees on account of death, disability, advanced age, retirement, illness, medical expenses, hospitalization, and supplemental unemployment benefits.

3.1.10.1.3 The plan must contain a definite formula for determining the amount to be contributed by the contractor and a definite formula for determining the benefits for each of the employees participating in the plan.

3.1.10.1.4 Except as provided in subsection 3.1.10.2, the contractor's contributions must be paid irrevocably to a trustee or third person pursuant to an insurance agreement, trust or other funded arrangement. The trustee must assume the usual fiduciary responsibilities imposed upon trustees by applicable law. The trust or fund must be set up in such a way that the contractor, its owners, officers, or business, will not be able to recapture any of the contributions paid in nor in any way divert the funds to its own use or benefit.

3.1.10.2 Unfunded self-insured fringe benefit plans (other than fringe benefits such as vacations and holidays which by their nature are normally unfunded) under which contractors allegedly make "out of pocket" payments to provide benefits as expenses may arise, rather than making irrevocable contributions to a trust or other funded arrangement as required under subsection 3.1.10.1.4, are not normally considered "bona fide" plans or equivalent benefits.

3.1.10.2.1 A contractor may request approval by the Administrator of an unfunded self-insured plan, in advance, in order to allow credit for payments under the plan to meet the fringe benefit requirements. In considering whether such a plan is bona fide, the Administrator will consider such factors as whether it could be reasonably anticipated to provide the prescribed benefits, whether it represents a legally enforceable commitment to provide such benefits, whether it is carried out under a financially responsible program, and whether the plan has been communicated to the employees in writing. The Administrator in his/her discretion may direct that assets be set aside and preserved in an escrow account or that other protections be afforded to meet the plan's future obligation. The Administrator will not approve, under any circumstances, a plan that benefits the contractor, its owners, officers, or business.

3.1.10.3 No benefit required by any other Federal law or by any State or local law, such as unemployment compensation, workers' compensation, or social security, is a fringe benefit.

3.1.10.4 The furnishing to an employee of board, lodging, or other facilities, are not "bona fide" wages or fringe benefits or equivalent benefits.

3.1.10.5 The furnishing of facilities which are primarily for the benefit or convenience of the contractor or the cost of which is properly a business expense of the contractor is not the furnishing of a "bona

fide" fringe benefit or equivalent benefit or the payment of wages. This would be true of such items, for example, as relocation expenses, travel and transportation expenses incident to employment, incentive or suggestion awards, and recruitment bonuses, as well as tools and other materials and services incidental to the employer's performance of the contract and the carrying on of his business, and the cost of furnishing, laundering, and maintaining uniforms and/or related apparel or equipment where employees are required by the contractor, by the contractor's state contract, by law, or by the nature of the work to wear such items.

3.1.10.6 Contributions by contractors for such items as social functions or parties for employees, flowers, cards, or gifts on employee birthdays, anniversaries, etc. (sunshine funds), employee rest or recreation rooms, paid coffee breaks, magazine subscriptions, and professional association or club dues, may not be used to offset any wages or fringe benefits specified in the contract, as such items are not "bona fide" wages or fringe benefits or equivalent benefits.

3.1.10.7 The actual cost of the benefit to the employer is the basis for evaluating the value of the fringe benefit. Administration costs are not considered fringe benefits. The cost of the benefits must be apportioned between employment on both public and private projects. Thus, the total value of the benefit would be divided by the total amount of time worked. This will result in benefit per unit of time which would be equally applicable to public and private employment projects. Example: an employee works two weeks (80 hours) on a public project and two weeks (80 hours) on a private project. The employer pays \$160 for the employee's health insurance for the month. The value of the benefit is \$1.00 per hour. The employer is not permitted to apply the entire premium to the public project alone.

3.1.11 Peak Week. In determining prevailing wages, the Department utilizes a "peak week" survey concept to ensure that wage and fringe benefit data obtained from employers reflects for each classification, the payroll period during which the greatest number of workers in each classification are used on a project. The survey solicits the number of employees and wages paid at each given rate during the peak week. The contractor or reporting organization selects the week (between July 1 to December 31 of the previous year) during which the greatest number of each classification of laborers and mechanics was working. Peak weeks may be different for each classification of worker.

3.1.12 Wage Determinations. A "**wage determination**" is the listing of wages (including fringe benefits) for each classification of laborers and mechanics, which the Administrator has determined to be prevailing in a given county and type of construction. Wage determinations are issued annually.

3.1.13 Maintenance Work. To "**maintain**" means to preserve or keep in an existing state or condition to prevent a decline, lapse, or cessation from that state or condition. Wages paid to workers performing maintenance work shall not be used in determining prevailing wage rates.

3.1.14 Area. The term "area" in determining wage rates under 29 Del.C. §6960 shall mean the county of the State in which the work is to be performed. The term "area" in determining classifications of workers under 29 Del.C. §6960 shall mean the State of Delaware.

3.1.15 Secretary. "**Secretary**" means the Secretary of Labor for the State of Delaware.

3.1.16 Administrator. "**Administrator**" means the Administrator of the Office of Labor Law Enforcement for the Delaware Department of Labor, Division of Industrial Affairs.

3.1.17 Department. "**Department**" means the Delaware Department of Labor.

1 DE Reg. 519 (11/01/97)

4 DE Reg. 1186 (01/01/01)

5 DE Reg. 205 (07/01/01)

7 DE Reg. 518 (10/01/03)

19 DE Reg. 415 (11/01/15)

#### 4.0 Determining Prevailing Wages

4.1 The Department of Labor shall conduct an annual survey for obtaining and compiling wage rate information and shall encourage the voluntary submission of wage data by contractors, contractors associations, labor organizations, public officials and other interested parties, reflecting wage rates paid to laborers and mechanics on various types of construction in the area.

4.1.1 Scope of Task. State directed and assisted construction activity is not restricted to any geographic sector of the state or to any particular type of construction. As a result, data collection methods employed by the Department for gathering prevailing wage information must be capable of determining patterns of wage compensation, including fringe benefits, for virtually all classifications of construction workers in at least the three major types of construction, within each of the three counties in Delaware. And, since the objective is

determining "prevailing" wages, the collection of data must be completed within a relatively brief time frame.

4.1.2 Data to be Collected. Operation of the prevailing wage program necessitates an annual effort by the Department to obtain, compile and analyze wage rate information. This section explores the nature of the data and the means of collection.

4.1.2.1 What Information. Wage rates are issued for each classification of laborer and mechanic that will likely be employed in State funded or assisted construction in a certain type of construction. Information on wages paid, therefore, must be collected and tabulated on the basis of distinct job classifications and construction categories.

The survey reporting form used by the Department to collect wage and fringe information, "Report of Construction Wage Rates", provides for reporting data which includes the contractor's name and address, telephone number, project description and location, the highest number of workers employed in each classification during the peak week of the period being surveyed (which shall be within the period July 1 to December 31 of the year preceding the request for data) and the wage rate, including bona fide fringe benefits, paid to each worker.

4.1.2.2 Geographic Scope. A prime objective of the prevailing wage law is to protect local rates of pay and 29 **Del.C.** §6960 stipulates that the "area" for the determination of wage rates is to be the county in which the work is performed.

## 1 DE Reg. 519 (11/01/97)

### 5.0 The Survey

5.1 The purpose of prevailing wage surveys is to collect information on wage and fringe benefit rates paid to mechanics and laborers working on construction projects of a similar character in a predetermined geographic area and calendar period. The Department attempts to give each contractor equal opportunity to be included in the final data base from which the prevailing rates are derived.

The Department shall conduct the survey in accordance with the following steps:

5.1.1 Plan the Survey.

The Department shall begin the survey preparation process no later than November of each year. Forms will be printed and supplies (envelopes, postage, etc.) will be ordered in preparation for the survey mailing. In addition, the Department will set up the external electronic production for submittal of survey information. The Department will request from the Division of Unemployment Insurance a computer printout (with two sets of address labels) of the names and addresses of all employers in the following North American Industry Classification System (NAICS) Codes, who reported workers during the calendar year in which the request is made:

- 236116 New Multifamily Housing Construction (except For-Sale Builders)
- 236118 Residential Remodelers
- 236220 Commercial and Institutional Building Construction
- 236210 Industrial Building Construction
- 236220 Commercial and Institutional Building Construction
- 237310 Highway, Street, and Bridge Construction
- 237990 Other Heavy and Civil Engineering Construction
- 237110 Water and Sewer Line and Related Structures Construction
- 237120 Oil and Gas Pipeline and Related Structures Construction
- 237130 Power and Communication Line and Related Structures Construction
- 236210 Industrial Building Construction
- 237110 Water and Sewer Line and Related Structures Construction
- 237120 Oil and Gas Pipeline and Related Structures Construction
- 237130 Power and Communication Line and Related Structures Construction
- 237990 Other Heavy and Civil Engineering Construction
- 238910 Site Preparation Contractors
- 238210 Electrical Contractors and Other Wiring Installation Contractors
- 238220 Plumbing, Heating, and Air-Conditioning Contractors
- 238910 Site Preparation Contractors
- 238320 Painting and Wall Covering Contractors
- 238210 Electrical Contractors and Other Wiring Installation Contractors
- 238140 Masonry Contractors
- 238310 Drywall and Insulation Contractors
- 238340 Tile and Terrazzo Contractors

- 238130 Framing Contractors
- 238350 Finish Carpentry Contractors
- 238330 Flooring Contractors
- 238160 Roofing Contractors
- 238170 Siding Contractors
- 238390 Other Building Finishing Contractors
- 238110 Poured Concrete Foundation and Structure Contractors
- 238140 Masonry Contractors
- 238990 All Other Specialty Trade Contractors
- 238120 Structural Steel and Precast Concrete Contractors
- 238190 Other Foundation, Structure, and Building Exterior Contractors
- 238150 Glass and Glazing Contractors
- 238910 Site Preparation Contractors
- 238220 Plumbing, Heating, and Air-Conditioning Contractors
- 238290 Other Building Equipment Contractors
- 238150 Glass and Glazing Contractors
- 238190 Other Foundation, Structure, and Building Exterior Contractors
- 238290 Other Building Equipment Contractors
- 561790 Other Services to Buildings and Dwellings
- 562910 Remediation Services

The Department will begin to assemble the survey packets in mid-December of each year in preparation for the early January mailing.

#### 5.1.2 Conduct the Survey.

On or before January 7th of each-year, survey forms will be mailed to every employer identified by the Division of Unemployment Insurance as having employed workers in the NAICS Codes listed above during the calendar year preceding the collection of data. Completed survey forms and electronic submission of survey data must be received by the Department or postmarked no later than February 8 of the survey year in order to be used in determining prevailing rates for that year. All other forms not complying with this deadline shall not be included. In the event that February 8th falls on a Saturday, Sunday, or legal holiday, the deadline for submitting survey forms shall be the next Department business day following the February 8th deadline.

By January 10th of each year, the Department shall notify the Delaware Contractor's Association, the Building Trades Council of Delaware, the Associated Builders and Contractors, the Delaware State AFL-CIO, the Secretary of the Department of Administrative Services, the Secretary of the Department of Transportation and the Roofing Contractors Association that the annual survey is being conducted. The notification shall contain a copy of the list of employers to whom survey forms were mailed and shall invite the addressees to submit the names and addresses of any employers whose names do not appear on the list. The notification shall also contain blank survey forms for the organizations' use.

The Department shall also notify the Local Unions whose collective bargaining wage rate has prevailed to submit their collective bargaining wage rate on forms provided by the Department and a copy of their current collective bargaining wage sheet to be entered as the prevailing wage rate for the survey which is being conducted.

As of January 1, 2016, the Delaware Department of Labor, Division of Industrial Affairs shall establish the prevailing wage for each respective craft or class of laborers and mechanics at the same rates established in collective bargaining agreements between labor organizations and their employers, or when collective bargaining agreement rates do not prevail, that govern work of a similar nature and similar crafts or classes of laborers and mechanics for the county where the public works contract will be performed if that particular labor organization's collective bargaining rate prevailed and they participated in the survey, for that particular trade or craft in that particular county for 4 consecutive years. When collective bargaining rates do not apply, the prevailing wage shall be the highest rate of the 4 years. If the agreed rate of pay is designated to be the craft's collective bargaining agreement, the annual rate adjustment will be determined by the collective bargaining agreement rate for each craft and county, each year.

When collective bargaining rates do not prevail, the annual rate adjustment shall be the Consumer Price Index-Construction. If the prevailing wage cannot be reasonably and fairly determined in any locality because no such agreements exists or the collective bargaining rate has not prevailed for 4 consecutive years the Department shall use the prevailing wage as established by the Department's annual prevailing wage survey.

For each respective craft or class of laborers or mechanics, the craft or class whose collectively bargained wages as of January 1, 2015, for that particular labor organization's collective bargaining rate prevailed for that particular trade or craft in that particular county is the prevailing wage rate and whose rate has prevailed for 4 of the last 5 years, or will prevail in the future for 4 consecutive years, shall have their collective bargaining agreement adopted as the prevailing wage rate negotiated by industry standards between workers and employers and the raise be determined by the collective bargaining agreement rate as of September 1 for that craft, county, and year.

5.1.3 Conduct Follow-Up.

On or before February 1st of each year, the Department shall mail a second notice to all employers who failed to respond to the first request for data. A second copy of the Department's master mailing list (indicating the employers who responded) shall be sent to the organizations listed in the preceding paragraph so that they can encourage the voluntary participation of their members.

5.1.4 Clarify and Analyze Data.

The data clarification process is to begin immediately upon receipt of survey responses. Each survey response is reviewed to determine completeness, appropriateness, and accuracy of data.

5.1.5 Code and Record Data.

Received by Mail survey responses are to be coded as follows:

"A" Survey response is usable (i.e., it is timely, complete, appropriate, and accurate)

"B" Employer reports no employees during survey period

"C" Survey response is incomplete

"D" Survey response is not applicable

"E" Survey request not deliverable at address used/Respondent not identified on survey form/  
Information is not usable

5.1.6 Electronic Data

Electronic data will be reviewed daily and be accepted or denied based upon the same criteria listed in subsection 5.1.5.

Data from usable responses are to be recorded weekly electronically in a summary ledger which contains a breakdown of each classification of worker for each type of construction for each county. Survey responses coded "A" shall be filed by county and type of construction. Survey responses coded "B", "D", and "E" shall be kept in files separate from the usable responses.

Respondents who submit code "C" survey responses (incomplete) shall be contacted by telephone by the Department. The Department will give the respondent an opportunity to supply the missing information. Failure to submit the missing information prior to the publication of the Prevailing Wage determination (see Section 6.3) will result in a disqualification of the survey response (to the extent that it is not usable).

The master mailing list shall be coded weekly to show the identity of survey participants as well as the number and types of responses.

All survey responses and documents are to be retained by the Department for a period of three years.

5.1.7 Determine Adequacy of Data.

At the conclusion of the survey period, the Department will review the survey ledger to determine the adequacy of data in each classification in each type of construction in each county. Data will be considered adequate if the worker classification contains the wages of ten or more employees. Classification data not meeting the above criteria will be added to the previous year's survey data for the same classification. If the data still do not reflect the wages paid to at least ten workers, the data will be considered inadequate.

5.1.8 Compute Prevailing Wage Rates.

The Department will enter usable data (from the summary ledgers) in the computer. If a majority (i.e., more than 50% of the workers reported in a particular category are paid at the same rate, that rate shall be the prevailing wage rate for the classification. For example:

Laborers / New Castle county / Building Construction

Workers Rate of Pay (including benefits)

50 @ \$17.25 = Majority

39 @ 16.75

10 @ 17.55

99

The prevailing wage rate \$17.25

In the absence of a majority, the computer will determine the average (mean) of the wages-paid, weighted by the numbers of workers paid at each rate. For example:

Laborers/New Castle County/Building Construction

Workers Rate of Pay (including benefits)

25 @ \$15.50 = \$387.50

25 @ 17.25 = 431.25

39 @ 16.75 = 653.25

10 @ 17.55 = 175.50

99 \$1,647.50

\$1,647.50 ÷ 99 workers = \$16.64 prevailing rate

#### 5.1.9 Determine Wage Rates for Classes of Workers For Which Inadequate Data Are Received.

The Department is required by law to determine wages to be paid to all classes of workers employed on public projects. For that reason, the Department must have a means by which it can determine rates for which no data or inadequate data were received. If no data are received for a given classification, or if inadequate data are received (i.e., fewer than 10 workers reported in a given classification), the previous year's prevailing rates shall be reissued.

**1 DE Reg. 519 (11/01/97)**

**19 DE Reg. 415 (11/01/15)**

## 6.0 Issuing Wage Determinations

### 6.1 Publication of Preliminary Determination.

On or before February 15th of each year, the Department shall publish a "Preliminary Determination of Prevailing Wage Rates." In the event that February 15th falls on a Saturday, Sunday, or legal holiday, the Department shall issue the preliminary results on the next Department business day following February 15th.

### 6.2 Appeals.

From February 15th to February 25th, the Administrator of the Office of Labor Law Enforcement will consider protests and inquiries relating to the preliminary results. An interested person seeking review or reconsideration of a wage determination must present a request in writing accompanied by a statement with any supporting data or other pertinent information.

Requests for reconsideration must be substantive and specific in order to be considered by the Department. For example: A request stating that, "the highway rates don't look right", would not be considered substantive or specific. However, a request stating that, "residential rates appear to have been erroneously included for carpenters in New Castle County Building Construction" would be considered substantive and specific.

From February 25th to March 1st, the Department will attempt to gather information necessary to resolve objections and requests for reconsideration. However, no appeals, objections, or requests will be considered if received by the Department after the February 25th deadline. The Department will respond in writing to all interested persons who submit a written request for review.

An appeal from the Administrator's decision must be made in writing and received by the Secretary of Labor within five calendar days from the date of the postmark on the Administrator's decision. The Secretary or his/her designee shall render a final decision in writing.

### 6.3 Issuance of Determination

On or before March 15th of each year, the Department shall publish its annual "Prevailing Wage Determination." The Determination shall be valid for a period of one year or until subsequent rates or amendments are issued by the Department.

Public agencies (covered by the provisions of 29 Del.C. §6960) are required to use the rates which are in effect on the date of the publication of specifications for a given project. "Date of publication" means the date on which the specifications are made available to interested persons (as specified in the published bid notice). In the event that a contract is not executed within one hundred and twenty (120) days from the earliest date the specifications were published, the rates in effect at the time of the execution of the contract shall be the applicable rates for the project.

### 6.4 Post Determination Actions. Wage determinations will be modified only for the purpose of correcting errors. Determinations will not be modified to include survey data received after the close of the survey period.

#### 6.4.1 Amendment to Correct Errors of Inadvertence. Amendments may be issued to correct inadvertent errors in the written text of a wage determination. The sole purpose is to correct wage schedules so that the wage determination will accurately and fully reflect the actual rates prevailing in the locality at the time the wage determination was issued. Such amendments (which may be issued at any time) are used to correct errors

due to transposition of rates and other clerical mistakes made in processing the schedule; they are not used to correct errors in judgment. Contracts which have already been awarded will not be affected by such amendments. Amendments issued more than ten (10) days prior to a bid opening must be used. Amendments issued less than ten (10) days prior to a bid opening may be disregarded.

- 6.4.2 Amendment to Correct Errors in Survey Data. Amendments which affect the validity of a wage determination may be issued to correct errors in rates resulting from erroneous information submitted by survey participants.

When the Department of Labor is notified in writing that a survey participant has submitted erroneous data (with regard to wages, fringe benefits, characterization of project, classification of workers, or county in which the work was performed), the Department shall determine the validity of the data. Corrections, if warranted, shall be made in the form of amended determinations at the end of each calendar quarter (beginning with the date the wage determination was issued). Contracts which have already been awarded will not be affected by such amendments. Amendments issued more than ten (10) days prior to a bid opening must be used. Amendments issued less than ten days prior to a bid opening may be disregarded.

- 6.4.3 Incorrect Wage Determinations: Before Contract Award.

If notification is received from the Department of Labor any time prior to the contract award that the bid documents contain the wrong wage schedule, such schedule or wage determination shall no longer be valid and may not be used - without regard to whether the bid opening has occurred.

If the bid documents contain no wage schedule, it is the contractor's (or subcontractor's) responsibility to contact the Department of Labor for the correct wage schedule. Such requests must be in writing. Responses to such requests will be in writing. Any contractor or subcontractor found using an incorrect wage schedule will be required to pay the correct wages based upon the proper classification of work as determined by the Department of Labor.

- 6.4.4 Lack of Valid Wage Determination: After Contract Award. If a contract is awarded without a wage determination or awarded with an incorrect wage determination, the contractor is responsible for the payment of the appropriate prevailing wage rates as determined by the Department of Labor.

- 6.4.5 Additional Classifications. Any class of laborers or mechanics which is not listed in the applicable wage determination but which is to be employed under the contract is to be classified by the Department of Labor in accordance with the procedures set forth in subsection 3.1.3 of these regulations.

- 6.4.6 Determination of Wages for Classifications for Which No Rates Are Published. Whenever a public project requires the services of a laborer or mechanic for which no rate has been published, the Department shall be notified in writing and shall determine the worker classification (from among the 26 classifications recognized by the Department of Labor) and the rate to be paid. The rate shall be determined as follows:

6.4.6.1 baseline rate in each county, the Department of Labor will determine the relationship between the "Building Construction" rates and the rates of the type of construction for which the rate is sought. To determine the relationship, (which is to be expressed as a percentage), the Department will use only those rates which were determined by data received in the relevant survey.

6.4.6.2 The Department will compare only those classifications for which corresponding rates were determined.

6.4.6.3 The total of the corresponding rates will be determined for each type of construction. The Heavy or Highway total will be divided by the Building rate to find what percentage of the Heavy or Highway rate to the Building rate.

6.4.6.4 The Department of Labor will multiply the Building rate for the requested classification of worker by the percentage determined in "c" to establish the applicable prevailing wage rate.

Hypothetical example:

A plumber's rate is needed for a New Castle County project. The Department of Labor has not published a rate for this classification. The Department of Labor will determine the relationship between New Castle County Highway rates and Building rates, comparing only corresponding rates which were actually determined by the relevant survey (rates carried forward from previous years due to lack of sufficient data are not to be used).

N.C.C. Building N.C.C. Highway

Bricklayers \$19.65 \$12.29

Carpenters \$23.37 \$21.69

Cement Finishers \$23.55 \$15.52

Laborers \$13.62 \$10.60

Power Equipment Operator \$22.94 \$15.77

Truck Drivers \$15.15 \$13.75

\$118.28 \$89.62

$\$89.62 \div 118.28 = 75.77\%$

The plumber's rate for New Castle County Building is \$26.54.  $\$26.54 \times 75.77\% = \$20.11$

The plumber's rate for New Castle County Highway = \$20.11

The same method can be used between corresponding types of construction when the Building construction rates do not contain a rate for the requested classification of worker; i.e., Heavy construction rates in Sussex County can be compared with Heavy construction rates in New Castle.

**1 DE Reg. 519 (11/01/97)**

**5 DE Reg. 205 (07/01/01)**

**7 DE Reg. 518 (10/01/03)**

**19 DE Reg. 415 (11/01/15)**

## **7.0 Enforcement**

7.1 The authority to enforce the prevailing wage rates derives from 29 **Del.C.** §6960(b) which states: "The Department of Labor shall investigate all claims that the prevailing wage rates as provided for under this section are not being or have not been paid."

7.1.1 Duties of Contractors. Every contractor and subcontractor on a public project shall:

7.1.1.1 Post in a prominent and accessible place at the site of the work, a legible copy of the applicable prevailing wage determination issued by the Department. The notice must remain posted during the life of the contract and must be supplemented in its entirety whenever amended wage rate determinations are issued by the Department.

7.1.1.2 Pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week and without subsequent deduction or rebate on any account, the full amounts accrued at the time of payment, computed at wage rates not less than those stated in the prevailing wage rate determination.

7.1.1.2.1 Laborers or mechanics performing work in more than one occupation shall be compensated at least the rate specified for each occupation for the time actually worked therein.

7.1.1.2.2 An employer shall not pay or permit any worker to accept wages less than the prevailing rate of wages as determined by the Department;

7.1.1.2.3 Every employer performing work on a public project shall furnish weekly payroll reports to the Department of Labor on forms provided (upon request) by the Department. Payroll reports shall be mailed or delivered by the employer to the Department within-one week from the last work day covered by the report. Failure to complete each and every section of the report (including the requirement that the form be notarized) will constitute a failure to submit sworn payroll information as required by the Department.

7.1.1.2.4 An employer shall not, at any time during the project, pay less than the prevailing rate of wages for each hour worked, regardless of the rate of pay being paid at any other time.

7.1.1.2.5 An employer shall not pay less than the prevailing rate of wages by docking pay, docking time, or deducting pay for any purpose unless provided for by law including the Wage Payment and Collection Act of the State of Delaware (19 **Del.C.** §1107).

7.1.1.2.6 A person shall not, either for himself/herself or any other person, request, demand, or receive, either before or after an employee is engaged, that such employee pay back, return, donate, contribute, or give any part or all of said employee'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 such employee from procuring or retaining employment. This paragraph 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 as permitted by law.

7.1.1.2.7 A person shall not, directly or indirectly, aid, request, or authorize any person to sign a release for any claim of wages with the intent to avoid payment of the prevailing wage rates.

7.1.1.3 Keep the following records for a period of three years:

7.1.1.3.1 The name and address of each employee;

7.1.1.3.2 The social security number of each employee;

- 7.1.1.3.3 A daily log for each individual employed upon the site of construction. The log must list (in general terms) the tasks performed by each employee and the amount of time spent performing each task. (Examples, "hung drywall", "wired lighting fixtures", etc.);
  - 7.1.1.3.4 Each employee's basic hourly rate of pay (If an employee performs public project work in more than one trade, the employer's record must reflect the hourly rate paid for each type of work performed; If an employee performs both prevailing wage work and non-prevailing wage work, the records must reflect the rates paid for each.)
  - 7.1.1.3.5 The number of hours worked in each occupation on the project in the applicable pay schedule, the number of hours worked in each day, and the total number of hours worked each week;
  - 7.1.1.3.6 The amount of wages paid each employee;
  - 7.1.1.3.7 The amount of wages paid each employee as fringe benefit payments;
  - 7.1.1.3.8 The amount of any deductions withheld from each employee's wages; and
  - 7.1.1.3.9 An accurate description of the nature of the deductions withheld from each employee's wages. (Fringe benefit deductions must be supported by a written fringe benefit policy as required by the Wage Payment and Collection Act.)
- 7.1.2 Investigation. A complaint may be filed with the Department by any employee upon a public project or any interested party. The complaint shall be in writing. Upon receipt of a complaint or upon its own motion the Department shall initiate an investigation.
- 7.1.2.1 The Department shall notify the employer by certified and First Class mail that a complaint has been filed and/or that an investigation has been initiated. The Department may request (or subpoena, if necessary) records, documents, or testimony necessary to make a determination as to the validity of the complaint or the employer's compliance with the law.
  - 7.1.2.2 Upon finding that an employer has not paid or is not paying the correct prevailing wage rates, If the Department of Labor shall notify the employer of the violations by certified mail and make an effort to obtain compliance is unable to obtain voluntary compliance, the Department shall notify the employer by certified and First Class mail that it has made a final determination that the employer is in violation and that the employer has the right to appeal the final determination to the Secretary (the "Final Notice"). All appeals of a Final Notice to the Secretary shall be in writing and must be received by the Secretary within fifteen (15) days from the receipt of the Final Notice. For purposes of determining "receipt," the failure to accept certified mail, combined with the lack of return of First Class mail, shall be deemed to be sufficient notice. Receipt shall be construed upon the date at which the certified mail was rejected. Failure to make a return of service shall not affect the validity of service. The Secretary shall acknowledge receipt of appeals within twenty (20) days and propose a schedule to determine the appeal. The Secretary may designate a neutral third party to preside over an appeal. Final Determinations shall be reviewable for an abuse of discretion or clear error of law.
  - 7.1.2.3 Upon failure to obtain compliance within fifteen (15) days of receipt of said certified mail, Consistent with the prevailing wage law, the Department may direct the contracting agency and/or the prime contractor to withhold payments to the employer (in an amount equal to the prevailing wage deficiencies, as determined by the Department) which are to be remitted to the Department for distribution upon resolution of the matter. The determination of when a matter shall be resolved shall be at the sole discretion of the Department. In addition, the Secretary may terminate all rights of the employer to proceed with the work under the contract and the employer shall be responsible for all damages resulting therefrom.
  - 7.1.2.4 If the dispute between the Department and the employer pertains to the classification of workers as determined by the Office of Labor Law Enforcement, the determination shall be reviewable by the Secretary or his/her designee and shall be reversed only upon a finding of abuse of discretion. Such appeals from the Office of Labor Law Enforcement's decision must be made in writing and must be received by the Secretary within fifteen (15) days from receipt of the Department's certified letter. Employers may request, in writing, expedited treatment of an investigation and/or an appeal to the Office of the Secretary. In such cases, the employers shall state with particularity the reason for the request and provide all information requested by the Department. The Department shall respond to requests for expedition within seven (7) days. If expedited relief is granted, the Department shall make every effort to expedite the investigation and/or appeal to the Secretary or his/her designee. The Department shall have sole discretion to grant or deny requests for expedition and such decisions are not reviewable.
- 7.1.3 Hearings. A hearing shall be held ~~only~~ in cases involving the termination of rights to proceed with the work under the public construction contract. A hearing shall also be held in cases involving classification

disputes. However, any such party's appeal request must be received by the Department of Labor within fifteen (15) days of said party's receipt of the final decision of the Office of Labor Law Enforcement. For purposes of determining "receipt," the failure to accept certified mail, combined with the lack of return of First Class mail, shall be deemed to be sufficient notice. Receipt shall be construed upon the date at which the certified mail was rejected. Failure to make a return of service shall not affect the validity of service. A hearing otherwise required by this subsection may be voluntarily waived at the request of the employer.

7.1.4 Hearing Practices and Procedures.

7.1.4.1 Scope of Rules. These rules shall govern the conduct of prevailing wage hearings ~~initiated held~~ by the Department of Labor ~~pursuant to 29 Del.C. §6960(d) to terminate all rights of the contractor or subcontractor to proceed with work under a public construction contract for failure to pay prevailing wage rates.~~

7.1.4.2 Initiation of Hearing. The Secretary of Labor ~~may~~ shall initiate a hearing by notifying the contractor or subcontractor by registered mail that said contractor or subcontractor is alleged to have violated ~~29 Del.C. §6960~~ the prevailing wage law. The notice shall give 20 days prior notice from receipt to all parties as follows:

7.1.4.2.1 The notice shall describe the subject matter of the proceedings;

7.1.4.2.2 The notice shall give the date, time and place the hearing will be held;

7.1.4.2.3 The notice shall cite the law or regulation giving the Department authority to act;

7.1.4.2.4 The notice shall inform the party of his/her right to present evidence, to be represented by counsel, and to appear personally or by other representative; and

7.1.4.2.5 The notice shall inform the parties that the Department will reach its decision based upon the evidence received.

For purposes of determining "receipt," the failure to accept certified mail, or the lack of return of First Class mail, shall be deemed to be sufficient notice. Receipt shall be construed upon the date at which the certified mail was rejected. Failure to make a return of service shall not affect the validity of service.

7.1.4.3 Conduct of Hearing.

7.1.4.3.1 The hearing ~~may~~ shall be conducted by the Secretary of Labor or by a hearing officer designated for that purpose by the Secretary.

7.1.4.3.2 In connection with such hearing, the Secretary or hearing officer ~~may~~ shall:

7.1.4.3.2.1 Issue subpoenas for witnesses and other sources of evidence, either on the Department's initiative or at the request of any party;

7.1.4.3.2.2 Administer oaths to witnesses;

7.1.4.3.2.3 Exclude plainly irrelevant, immaterial, insubstantial, cumulative and privileged evidence;

7.1.4.3.2.4 Limit unduly repetitive proof, rebuttal and cross-examination;

7.1.4.3.2.5 Hold ~~preheating prehearing~~ conferences for the settlement or simplification of issues by consent, for the disposal of procedural requests or disputes and to regulate and to expedite the course of the hearing.

7.1.4.3.3 ~~The conduct of hearing shall not be bound by technical rules of evidence pursuant to 19 Del.C. 405(8)~~ The rules of evidence applied in civil cases by the courts of the State of Delaware shall not be strictly followed. The Secretary or hearing officer may allow evidence not admissible under these rules of evidence where, in his or her judgment, application of the exclusionary rule would result in unnecessary hardship and the evidence offered is of a kind commonly relied upon by reasonably prudent persons in the conduct of their affairs. Hearsay may be admissible in administrative hearings, but may not constitute the sole basis for the Secretary or hearing officer's determination upon the factual issue addressed by the hearsay evidence.

7.1.4.3.3.1 All hearings shall be conducted in a fair, impartial, expeditious and orderly manner.

7.1.4.3.4 The burden of proof shall be upon the Department. (If the records maintained by the employer do not provide sufficient information to determine the exact amount of wages owed, the Department may make a determination based on available evidence.)

7.1.4.3.5 A record from which a verbatim transcript can be prepared shall be made of all hearings in contested cases. Transcripts shall be made at the request and expense of the requesting party.

7.1.4.3.6 A party's failure to appear at a hearing that has been duly noticed shall not mandate the continuance of the hearing. At the discretion of the Secretary or hearing officer, the hearing shall proceed in the party's absence, which shall be noted on the record.

7.1.4.3.7 If a party, or counsel to a party, engages in conduct in violation of an order of the independent reviewer, or other disruptive conduct during an oral hearing, the independent reviewer may impose non-monetary sanctions therefor, including the issuance of an order: (i) excluding the party and/or his or her counsel from any further participation in the hearing; (ii) striking briefs from the record; (iii) providing that certain facts shall be taken to be established for purposes of the appeal; or (iv) providing for such other relief as is just and equitable under the circumstances.

7.1.4.4 Proposed Orders.

7.1.4.4.1 Whenever a hearing officer presides over a hearing (s)he shall prepare a proposed order for the consideration of the Secretary which shall include:

7.1.4.4.1.1 A brief summary of the evidence and recommended findings of fact based upon the evidence;

7.1.4.4.1.2 Recommended conclusions of law; and

7.1.4.4.1.3 Recommended decision.

7.1.4.4.2 When the proposed order is submitted to the Secretary, a copy shall be delivered to each of the other parties who shall have 10 days to submit in writing to the Secretary exceptions, comments and arguments respecting the proposed order.

7.1.4.5 Record. With respect to each case, all notices, correspondence between the agencies and the parties, all exhibits, documents in testimony admitted into evidence and all recommended orders, summary of evidence and findings of all interlocutory and final orders of the agency shall be included in the agency's record of the case and shall be retained by the agency for three (3) years.

7.1.4.6 Decision; Final Order.

7.1.4.6.1 The Secretary shall make his/her decision based upon the entire record of the case and upon summaries and recommendations of the hearing officer.

7.1.4.6.2 Every case decision of the Secretary shall be incorporated in a final order which shall include, where appropriate:

7.1.4.6.2.1 A brief summary of the evidence;

7.1.4.6.2.2 Findings of fact based upon the evidence;

7.1.4.6.2.3 Conclusions of law;

7.1.4.6.2.4 Any other conclusion required by the law or the Department of Labor;

7.1.4.6.2.5 A concise statement of the Department of Labor's determination or action on the case.

7.1.4.6.3 Every final order shall be authenticated by the signature of the Secretary.

7.1.4.6.4 Every final order shall immediately be mailed or delivered to each party, to the contracting agency, and each other person requesting it.

7.1.4.6.5 Every final order may be amended or modified by the same procedure used for the initial adoption of the order.

7.1.4.7 Informal Disposition. Informal disposition may be made of any matter set for hearing by stipulation, agreed settlement, consent order, or default.

**1 DE Reg. 519 (11/01/97)**

**8.0 Subsequent Modification of Regulations**

The Secretary may, upon his/her own motion or upon the written request of any interested person setting forth reasonable grounds therefore, revoke or modify these regulations, after an opportunity has been given to interested persons to present their views on proposed changes. These regulations shall take effect in accordance with the requirements of the Administrative Procedures Act which is found in 29 **Del.C.** Ch. 101.

**1 DE Reg. 519 (11/01/97)**

**4 DE Reg. 1186 (01/01/01)**

**5 DE Reg. 205 (07/01/01)**

**7 DE Reg. 518 (10/01/03)**

**19 DE Reg. 415 (11/01/15)**

**22 DE Reg. 203 (09/01/18) (Prop.)**