

REQUIRE PREVAILING WAGE FOR STATE CONSTRUCTION

Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

House Bill 4007 as enacted
Public Act 10 of 2023
Sponsor: Rep. Brenda Carter
House Committee: Labor
Senate Committee: Labor
Complete to 2-13-24

Analysis available at
<http://www.legislature.mi.gov>

SUMMARY:

House Bill 4007 creates a new act that requires a policy commonly known as “prevailing wage” for *state construction projects* receiving public funding. The new act is similar to 1965 PA 166, which was repealed in 2018 (see **Background**, below). Under the new act, every contract for such a project that requires the employment of *construction mechanics* must include a term stating that the rates of wages and fringe benefits to be paid to each class of construction mechanics must equal or exceed the wage and benefit rates that are standard in the locality where the work is to be performed.

State construction project means any new construction, alteration, repair, installation, painting, decorating, completion, demolition, conditioning, reconditioning, or improvement of public buildings, schools, works, bridges, highways, or roads authorized by a *contracting agent*. However, it does not include projects subject to the jurisdiction of the Michigan Civil Service Commission.

Contracting agent means any officer, school board, board or commission of the state, or a state institution supported in whole or in part by state funds, authorized to enter into a contract for a state project or to perform a state project by the direct employment of labor.

Construction mechanic means a mechanic, laborer, worker, helper, assistant, or apprentice working on state projects. It does not include executive, administrative, professional, office, or custodial employees.

If a contracting agent does not include such a term in the contract documents or bidding forms, it is liable for any loss of wages and fringe benefits suffered by the construction mechanics on that project. In addition to any other legally available remedies, those construction mechanics are also eligible for injunctive relief, may bring a civil action for the violation, and may recover damages with 10% interest per annum.¹

Contracts also must include a term providing that construction mechanics are the intended beneficiaries of the contractual prevailing wage, fringe benefit, nonretaliation, and nondiscrimination requirements provided by the act and a term providing that a construction mechanic who is aggrieved by a failure to be paid prevailing wages or benefits or who faces

¹ For civil actions brought under the act, a construction mechanic’s failure to exhaust all administrative remedies before the Department of Labor and Economic Opportunity does not serve as a defense.

retaliation or discrimination as a result of the act can bring an action against a contractor or subcontractor for damages or injunctive relief.

Prevailing wage determination

The Department of Labor and Economic Opportunity (LEO) must establish wages and benefits at the rate that prevails on projects of a similar character in the relevant *locality* (the county, city, village, township, or school district where the physical work on a state project is to be performed) under collective bargaining agreements (CBAs) or understandings between labor organizations of construction mechanics and their employers. If no such CBAs or understandings exist, LEO must determine the prevailing wage for that locality by using the rates and benefits that prevail in the same or most similar employment in the nearest and most similar neighboring locality where a CBA agreement or understanding exists.

Before a contracting agent can advertise for bids on a state project, it must have LEO determine the prevailing rates for wages and fringe benefits for all classes of construction mechanics called for in the contract. A rate schedule must be included in the bidding forms. If a contract is not awarded or construction has not begun within 90 days of the determination, LEO must redetermine the prevailing wage and fringe benefit rates before the contract is awarded.

All determined wages and benefits must be filed with LEO and publicly accessible.

Compliance and recording requirements

Contractors and subcontractors must keep a copy of all prevailing wage and fringe benefit rates included in the contract posted in a conspicuous area at the construction site. They also must keep a record of the name and occupation of, and wages and benefits paid to, each construction mechanic employed in connection with the contract. This record must be available for inspection by the contracting agent and LEO. Contracting agents, contractors, and subcontractors must maintain all certified payroll records and other records required by the act for at least three years, and they must provide LEO or a department designee with any requested records or other information necessary for LEO to ensure compliance.

Contractors and subcontractors must pay wages and provide benefits as outlined in the contracts. If a lower rate than the prevailing wage or fringe benefit rate has been or will be paid, a contracting agent may terminate the contractor's right to proceed under that portion of the contract after providing a written notice. The agent may then complete the contract through a separate agreement with another contractor. The original contractor and any sureties are liable for any excess costs resulting from the termination.

Nonretaliation and nondiscrimination

Contractors and subcontractors cannot discharge, discipline, or otherwise discriminate against a construction mechanic, or threaten to take any of those actions, for reporting a real or suspected violation of the act. An employee who believes they have been discharged or disciplined or otherwise suffered harm to their employment status for filing a complaint, participating in an investigation, or raising concerns about their wages and benefits as covered by the act can file a complaint with LEO within 90 days of the alleged retaliatory act.

The act states that there is a rebuttable presumption of retaliation if an employee was removed from the project or not provided similar overtime, hours, or other opportunities that were available prior to the retaliatory action. If LEO determines that such a retaliation has occurred,

it can order the rehiring or reinstatement of the employee, or another equitable remedy such as full back pay or lost earnings.

Complaints

If an employee believes that a violation of the act has occurred or if a third party has credible information that a violation occurred, that individual can file a complaint with LEO, and LEO can begin an investigation. An employee who files a complaint may request to keep their identity confidential from their employer. LEO cannot accept or investigate complaints made more than three years after the alleged violation or the last date a violation could have occurred, whichever is later.

Enforcement and investigations

LEO or a department designee is responsible for administering the act and for enforcing the payment of prevailing wages and benefits by investigating and ascertaining the wages paid by an employer subject to the act. LEO or its designee can enter any project during normal working hours to inspect payroll records, interview and conduct wage surveys of employees, or take any other action reasonably related to enforcement of the act.

To investigate an alleged violation of the act or as part of a review proceeding under the act, LEO or a designee can do any of the following:

- Administer oaths or affirmations.
- Privately interview employees, supervisors, and other individuals to determine information relevant to enforcement.
- Subpoena and compel the attendance of witnesses.
- Gather evidence.
- Require the production of records or other documents that it considers relevant or material to the inquiry.

Violations

If LEO determines that a violation occurred, it may order any responsible contracting agent, contractor, or subcontractor to pay any employee the amount they are owed from the violation. Unless an appeal is in process, LEO can generally enforce an order under the act in either a court of competent jurisdiction or in Ingham County circuit court.

Each violation of the act is also punishable by a civil fine of up to \$5,000 and an additional 10% penalty as determined by LEO. The attorney general or relevant county prosecutor can bring an action to collect the fine.

Fines must be paid to LEO, made payable to the state of Michigan, and credited to the general fund. If a fine is not appealed and is not paid within 15 working days, LEO must issue a letter to the employer that demands the payment within 20 days of receiving the letter. If the penalty is still unpaid, the Department of Treasury must collect the fine by first offsetting the amount of the fine against any amount that the state may owe to the employer and then requesting that the attorney general recover the remaining amount of the fine by instituting a civil action.

Review request and hearing

An employer or employee may request a review of LEO's determination within 14 days of receiving notification of the determination. Otherwise, unless the employer or employee provides good cause for a late request, the determination is final.

If a review is appropriately requested, LEO must appoint a hearings officer, who must hold a hearing and issue a determination to all involved parties (the employer, employee, and LEO) that affirms, modifies, or rescinds LEO's original order. The determination must be made within 30 days of the hearing's conclusion. All review proceedings must be conducted in accordance with the Administrative Procedures Act.

A party may challenge the hearings officer's determination in court, and the venue for an appeal is in the circuit court for any of the following:

- Where the employee lives.
- Where the employment was located.
- Where the employer has a principal place of business.

Work project appropriation

The bill appropriate \$75,000 to LEO from the general fund as a one-time work project appropriation under section 451a of the Management and Budget Act. The purpose of the work project is to implement and communicate information about the act, either by state employees or by contract, with an estimated completion date of December 31, 2024.

(This appropriation has the effect of making the bill immune from referendum under section 9 of Article II of the state constitution.)

Exempt contracts

Contracts with provisions requiring prevailing wage payments determined by the federal government under the federal Davis-Bacon Act or with minimum wage schedules that are the same as the prevailing wages in the relevant locality are exempt from the act.² The act does not apply to any contracts entered or bids made before February 13, 2024 (the effective date of the act) or to any contracts for state projects partially or wholly funded by revenue from millages authorized under the Revised School Code before that date.

Finally, the act states that any portion of the act declared invalid or unenforceable is severable from the remaining provisions of the act. All Michigan laws are always already severable under section 5 of Chapter 1 of the Revised Statutes of 1846.³

BACKGROUND:

Public Act 166 of 1965 required the use of prevailing wages for state-funded construction projects until 2018, when the Michigan legislature adopted an initiative petition repealing the act.⁴ Supporters of the repeal argued that the 1965 law was outdated, and a repeal of prevailing

² The Davis-Bacon Act requires contractors and subcontractors working on federally funded construction projects to pay locally prevailing wages: <https://www.dol.gov/agencies/whd/laws-and-regulations/laws/dbra>.

³ <http://legislature.mi.gov/doc.aspx?mcl-8-5>

⁴ A summary of the petition can be found [here](#).

wage would save taxpayer money on public works projects and increase competition for the projects. In 2021, however, Governor Whitmer announced that the Department of Technology, Management and Budget (DTMB) would resume the prevailing wage requirement for state construction contracts for projects greater than \$50,000 beginning in 2022.⁵ The governor argued that while the law requiring prevailing wage was no longer in place, DTMB still had the authority to adopt such a policy in overseeing state contracts.

FISCAL IMPACT:

Impact on Department of Labor and Economic Opportunity

House Bill 4007 would likely result in increased costs for the Department of Labor and Economic Opportunity, for the implementation and administration of prevailing wage laws. LEO estimates that additional staff within the Wage and Hour Division would be required on an ongoing basis to administer and enforce prevailing wage on public projects, including specific projects conducted by school districts and local governments. Information technology (IT) updates would also be necessary to implement and administer the bill. Preliminary estimates from LEO indicate that costs in the first year could total approximately \$500,000, which would support the necessary staffing and IT modifications. The bill would appropriate \$75,000 GF/GP to LEO to implement and communicate information about the provisions of the bill. The funds would be designated as a work project appropriation with an estimated completion date of December 31, 2024.

Impact on State and Local Expenditures

House Bill 4007 would have an indeterminate fiscal impact on state and local expenditures for construction projects (i.e., those by state departments, public and charter schools, community colleges, and universities financially sponsored by the state). As of March 1, 2022, the state has a prevailing wage requirement for any construction-based contracts issued by DTMB, which would limit any current fiscal impact on projects subject to that procurement policy. The provisions of the bill would broaden prevailing wage applicability to other state-funded projects. However, any fiscal impact would be project-specific and difficult to determine.

The vast academic and policy literature pertaining to the economic effects and fiscal impacts of prevailing wage laws, or lack thereof, is decidedly contested, lacking consensus on proper research methods and appropriate sources of data, let alone findings and conclusions drawn from such data via such methods. The House Fiscal Agency previously compiled a partial bibliography of studies of the impacts of prevailing wages laws, which can be accessed online at https://www.house.mi.gov/hfa/PDF/Alpha/Prevailing_Wage_Memo.pdf

Impact on Transportation

House Bill 4007 would likely have a minimal fiscal impact on Michigan Department of Transportation (MDOT) construction contracts. Much of MDOT's transportation program is carried out by private construction contractors working under contract with MDOT. All of MDOT's state trunkline road and bridge capital construction, rehabilitation, and reconstruction program is performed by private contractors. Most of MDOT's Capital Preventive Maintenance (CPM) program is also performed by private contractors. MDOT also administers

⁵ Information on this requirement can be found [here](#), and wage rates for DTMB-funded construction projects for each county can be found [here](#).

many capital construction and reconstruction projects on behalf of local road agencies, airport improvement projects on behalf of local airports, and capital rail projects.

Over the five fiscal years ending September 30, 2022, total MDOT construction contracts, based on awarded bid totals, have averaged \$2.15 billion—with a peak in FY 2021-22 at \$2.91 billion. All of these construction contracts are awarded through open competitive selection, and most of them were supported, at least in part, with federal funds.

Projects funded in any part with federal aid are subject to the prevailing wage requirements of the federal Davis-Bacon Act (40 USC 3141 et seq.), which requires that all contractors and subcontractors performing work on federal contracts or federally assisted contracts in excess of \$2,000 pay not less than the prevailing wage rates and fringe benefits listed in the contract's Davis-Bacon wage determination. MDOT awards relatively few construction contracts that are not funded, at least in part, with federal aid, and thus almost all of MDOT's construction contracts, including projects administered by MDOT on behalf of local units of government, would be subject to the federal Davis-Bacon prevailing wage requirements. Consequently, the 2018 repeal of 1965 PA 166, and the restoration of prevailing wage requirements in House Bill 4007, would appear to have a minimal fiscal impact on capital construction contracts administered by MDOT.

Impact on Corrections and the Judiciary

House Bill 4007 would have an indeterminate fiscal impact on the state and on local units of government. Under the bill, violations of the requirement for contracts for state construction projects to include prevailing wage provisions could result in civil penalties. The fiscal impact to the state would depend on the number of violations and subsequent penalties. Also, under the bill, revenue collected from payment of civil penalties would be required to be paid to the Department of Labor and Economic Opportunity and credited to the state general fund. The fiscal impact on local court systems would depend on how provisions of the bill affected court caseloads and related administrative costs. It is difficult to project the actual fiscal impact to courts due to variables such as law enforcement practices, prosecutorial practices, judicial discretion, case types, and complexity of cases.

Legislative Analyst: Holly Kuhn
Fiscal Analysts: Marcus Coffin
Ben Gielczyk
William E. Hamilton
Robin Risko

■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations and does not constitute an official statement of legislative intent.