

# S.B. NO. 2873

JAN 23 2014

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## A BILL FOR AN ACT

RELATING TO WAGES AND HOURS ON PUBLIC WORKS LAW CONTRACTOR COMPLIANCE.

**BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:**

1           SECTION 1. Chapter 104, Hawaii Revised Statutes, is  
2 amended by adding a new section to be appropriately designated  
3 and to read as follows:

4           "§104-    Provisions of law may not be waived by agreement.  
5 No provision of this chapter may in any way be contravened or  
6 set aside by private agreement."

7           SECTION 2. Section 104-1, Hawaii Revised Statutes, is  
8 amended to read as follows:

9           "**§104-1 Definitions.** As used in this chapter, the  
10 following words and phrases shall have the following meanings:

11           ~~[-1]~~ "Basic hourly rate" means the hourly wage paid to a  
12 laborer or mechanic for work performed during non-overtime  
13 hours, but shall not include the cost to an employer of  
14 furnishing fringe benefits whether paid directly or indirectly  
15 to the laborer or mechanic as provided in paragraph (7) ~~[-]~~.

16           ~~[-2]~~ "Construction" includes alteration, repair,  
17 painting, and decorating ~~[-]~~.

1        "Contractor" means any person furnishing construction for a  
2 public work under a contract with a governmental contracting  
3 agency, subcontractor, or any other person under a subcontract  
4 arrangement with any person who has a construction contract  
5 subject to this chapter.

6        [~~3~~] "Department" means the department of labor and  
7 industrial relations[+].

8        [~~4~~] "Director" means the director of labor and  
9 industrial relations of the State[+].

10       [~~5~~] "Governmental contracting agency" means the State,  
11 any county and any officer, bureau, board, commission, or other  
12 agency or instrumentality thereof[+].

13       [~~6~~] "Overtime compensation" means compensation based on  
14 one and one-half times the laborers or mechanics basic hourly  
15 rate of pay plus the cost to an employer of furnishing a laborer  
16 or mechanic with fringe benefits as described in paragraph  
17 (7) [+].

18       "Public work" means any project, including development of  
19 any housing pursuant to section 46-15 or chapter 201H and  
20 development, construction, renovation, and maintenance related  
21 to refurbishment of any real or personal property, where the  
22 funds or resources required to undertake the project are to any

1 extent derived, either directly or indirectly, from public  
2 revenues of the State or any county, or from the sale of  
3 securities or bonds whose interest or dividends are exempt from  
4 state or federal taxes.

5 [~~7~~] "Wages", "rate of wages", "wage rates", "minimum  
6 wages" and "prevailing wages" mean the basic hourly rate and the  
7 cost to an employer of furnishing a laborer or mechanic with  
8 fringe benefits, including but not limited to health and welfare  
9 benefits, vacation benefits, and pension benefits, whether paid  
10 directly or indirectly to the laborer or mechanic."

11 SECTION 3. Section 104-2, Hawaii Revised Statutes, is  
12 amended by amending subsection (a) to read as follows:

13 "(a) This chapter shall apply to every contract in excess  
14 of \$2,000 for construction of a public work project to which a  
15 governmental contracting agency is a party; provided that this  
16 chapter shall not apply to experimental and demonstration  
17 housing developed pursuant to section 46-15 or housing developed  
18 pursuant to chapter 201H if the cost of the project is less than  
19 \$500,000 and the eligible bidder or eligible developer is a  
20 private nonprofit corporation.

21 For the purposes of this subsection:

1 "Contract" includes but is not limited to any agreement,  
2 purchase order, or voucher in excess of \$2,000 for construction  
3 of a public work project.

4 "Governmental contracting agency" includes any person or  
5 entity that causes either directly or indirectly the building or  
6 development of a public work.

7 "Party" includes eligible bidders for and eligible  
8 developers of any public work and any housing under chapter  
9 201H; provided that this subsection shall not apply to any  
10 housing developed under section 46-15 or chapter 201H if the  
11 entire cost of the project is less than \$500,000 and the  
12 eligible bidder or eligible developer is a private nonprofit  
13 corporation.

14 ~~["Public work" means any project, including development of~~  
15 ~~any housing pursuant to section 46-15 or chapter 201H and~~  
16 ~~development, construction, renovation, and maintenance related~~  
17 ~~to refurbishment of any real or personal property, where the~~  
18 ~~funds or resources required to undertake the project are to any~~  
19 ~~extent derived, either directly or indirectly, from public~~  
20 ~~revenues of the State or any county, or from the sale of~~  
21 ~~securities or bonds whose interest or dividends are exempt from~~  
22 ~~state or federal taxes.] "~~

1 SECTION 4. Section 104-22, Hawaii Revised Statutes, is  
2 amended to read as follows:

3 "**§104-22 Investigation; penalties.** (a) The department  
4 may conduct investigations to determine compliance with this  
5 chapter. The department may enter the job site, examine records  
6 of any contractor, either during or after the performance of any  
7 contract, or subpoena the records. The department may also  
8 interview employees during working hours on the job.

9 (b) If any contractor interferes with or delays any  
10 investigation by the department, the governmental contracting  
11 agency, on receipt of written notice from the director of the  
12 interference or delay, shall withhold from the contractor all  
13 further payments until the director has notified the  
14 governmental contracting agency in writing that the interference  
15 or delay has ceased. Interference or delay includes failure to  
16 provide requested records under section 104-3; failure to allow  
17 employees to be interviewed during working hours on the job; and  
18 falsification of records required under this chapter. The  
19 department shall assess a penalty of [~~\$1,000~~] \$10,000 per  
20 project for interference or delay. For each day thereafter that  
21 the employer fails to cooperate, the director shall assess a  
22 penalty of [~~\$100~~] \$1,000 per project.

1        (c) Notwithstanding the prompt payment provisions of  
2 section 103-10.5 to the contrary, the general contractor shall  
3 be secondarily liable and shall remain secondarily liable for  
4 the payment of the back wages and penalties assessed against any  
5 of the contractors on the public works construction project that  
6 are unpaid on the later of the twenty-first day after the  
7 notification of violation has been sent or a decision has been  
8 issued pursuant to section 104-23(c). Upon receipt, the  
9 governmental contracting agency shall notify the contractor,  
10 and, if the contractor is a subcontractor the governmental  
11 contracting agency, shall notify the general contractor, of its  
12 intent to pay the amount of back wages and penalties found due  
13 and demanded by the department within twenty-one days from the  
14 date of the notification. The governmental contracting agency  
15 shall pay from any amounts then due to the contractor or general  
16 contractor, the amount assessed as back wages and penalties.  
17 Any such payment made by the governmental contracting agency  
18 shall not be deemed a breach of contract, nor shall such payment  
19 excuse the contractor or general contractor from completing the  
20 project for the contract price and in accordance with the  
21 contract completion deadline."


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1 SECTION 5. Section 104-23, Hawaii Revised Statutes, is  
2 amended by amending subsection (b) to read as follows:

3 "(b) A notification of violation shall be final and  
4 conclusive unless within twenty days after a copy [~~was mailed to~~  
5 ~~the violator, unless within the twenty day period the violator]~~  
6 has been sent to the contractor, the contractor files a written  
7 notice of appeal with the director."

8 SECTION 6. Statutory material to be repealed is bracketed  
9 and stricken. New statutory material is underscored.

10 SECTION 7. This Act shall take effect upon its approval;  
11 provided that section 4 of this Act shall be applicable to all  
12 construction contracts entered into after the effective date of  
13 this Act.

INTRODUCED BY: 

BY REQUEST

**Report Title:**

Prevailing Wage; Construction

**Description:**

Increases the prevailing wage penalty from \$1,000 per project and \$100 per day to \$10,000 per project and \$1,000 per day. Clarifies that general contractors are secondarily liable for wages and penalties found due by their subcontractors and their agents. Prohibits private agreements made to contravene the law. Adds a definition for "contractor" and "public work".

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*



JUSTIFICATION SHEET

DEPARTMENT: Labor and Industrial Relations

TITLE: A BILL FOR AN ACT RELATING TO WAGES AND HOURS ON PUBLIC WORKS LAW CONTRACTOR COMPLIANCE.

PURPOSE: The purpose of this proposal is to protect employees in this State by making it clear that the requirements of chapter 104, Hawaii Revised Statutes (HRS), shall not be contravened, discharged, or delayed by adding a new section stating that the law cannot be set aside by private agreement. Additional amendments are to clarify the definition of contractor, and public work, and strengthening the penalties to insure compliance with the law as follows: (1) adding a definition of "contractor"; (2) moving the definition of "public work" from section 104-2(a) to 104-1, definitions; (3) clarifying that the general contractor is secondarily responsible for actions of their subcontractors; (4) increasing the penalty for falsification or delay from \$1,000 to \$10,000 and daily from \$100 to \$1,000; and (5) clarifying that a contractor cannot use refusal of a notice of violation to delay implementation of the penalties imposed by that notice.

MEANS: Add a new section to chapter 104, HRS, and amend sections 104-1, 104-2(a), 104-22, and 104-23(b), HRS.

JUSTIFICATION: The Wages and Hour of Employees on Public Works Law does not contain a provision that makes clear that the law cannot be set aside by a private agreement between an employer and an employee. This new section is consistent with the protections contained in chapter 388, HRS, Hawaii's Payment of Wages and Other Compensation and chapter 387, HRS, Wage and Hour Laws.

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By adding a definition of "contractor", this proposal will clarify the distinction of a general contractor and its subcontractor as the term is used throughout the statute.

This proposal also codifies a general term usually contained in the construction contracts that the contract for a public construction project is between the general contractor and the contracting agency. The general contractor is thus responsible to ensure that their subcontractors are also in compliance with the requirements of the law. Subcontractors have attempted to escape their responsibility to pay back wages and penalties, by closing their business and continuing under a different registered business name. This makes it difficult or impossible to collect the back wages and penalties found due to workers. This bill would make clear that the general contractor remains liable for back wages and penalties for their violations as well as for violations by their subcontractors, as is usually found in the terms and conditions of the contract between the governmental contracting agency and the general contractor. This will help to ensure that all workers on the construction project are paid the appropriate wages.

Additionally, the definition of "public work" is moved from section 104-2 to section 104-1, "Definitions". Currently located in section 104-2, the definition of public works can be misconstrued to only be applied to section 104-2. This move is intended to clarify that the public works definition applies to the whole chapter and not to just one subsection.

Further, by increasing the penalty for falsification or delay from \$1,000 to \$10,000, and the daily penalty increase from \$100 to \$1,000 will make a significant impact on the importance and priority of

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these cases. In the last two years, back wages and penalties of approximately \$1,000,000 each year have been assessed under this law. The increased fines are more in line with the fraud committed on the State.

Lastly, these proposed amendments would maintain fair bidding and protection of workers' rights and benefits by strengthening the investigation processes as stated.

Impact on the public: The proposed amendments will improve worker protections on state and county public works construction projects.

Impact on the department and other agencies: Provides the Wage Standards Division with clearer enforcement standards to ensure workers are paid correctly and to recover all wages owed.

GENERAL FUND: The increased fines would be deposited into the General Fund.

OTHER FUNDS: None.

PPBS PROGRAM DESIGNATION: LBR-152.

OTHER AFFECTED AGENCIES: Department of Accounting and General Services  
Department of Education  
Department of Transportation  
State Procurement Office  
Office of Hawaiian Affairs  
University of Hawaii  
City and County of Honolulu  
County of Hawaii  
County of Kauai  
County of Maui

EFFECTIVE DATE: Upon approval.