

Prevailing Wage Debarment Procedures in Massachusetts, New York, and Ohio

By: Lee Hansen, Principal Analyst
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Issue

This report describes the debarment procedures required under the prevailing wage laws in Massachusetts, New York, and Ohio.

Summary

Many states require contractors (including subcontractors) on their state or local public works projects to pay their construction workers a “prevailing wage” and meet other related requirements, such as keeping certified payrolls. In these states, the law typically “debars” contractors that fail to meet the prevailing wage law’s requirements (i.e., it prohibits them from contracting with the state or its towns for a certain period).

The prevailing wage laws in Massachusetts, New York, and Ohio all establish specific procedures that must be followed before debarring a contractor. In general, these laws require the state agency or official charged with administering the prevailing wage law to investigate complaints, hold hearings, and issue decisions on whether a contractor violated the law. If so, the agency or official may debar the contractor and impose various other penalties.

Contractors may appeal the decisions administratively and through the states’ courts.

For additional information about prevailing wage debarment provisions in these and other states, see OLR Report [2019-R-0295](#).

Summaries of the debarment procedures under the three states’ prevailing wage laws are below.

Massachusetts

Under the Massachusetts prevailing wage law's debarment provision, contractors (and subcontractors) are automatically debarred when a court convicts them of certain criminal violations ([Mass. Gen. Law 149 § 27c](#)). After the court's final conviction and disposition, the court clerk must send a notice of the conviction to the attorney general, who must publish notice about the debarment to all state and local departments and agencies that contract for public construction. The attorney general may take any actions needed to enforce these provisions and the state's superior court can enjoin or invalidate any contract that violates them.

As an alternative to initiating criminal proceedings, however, the law also allows the attorney general to issue a written warning or civil citation. A citation may require the contractor to rectify the infraction, pay restitution to the aggrieved party, or pay a civil penalty (or any combination of them).

Penalty Factors

When deciding the amount of a civil penalty, up to certain specified limits, the attorney general must consider previous violations, intent, the number of employees affected by the violation, the dollar amount of the violation, and the total dollar amount of the public contract or payroll involved. For citations over certain violations, the attorney general may also require the contractor to obtain a bond in an amount needed to rectify the infraction and ensure compliance with the law. If a contractor fails to comply with a citation's requirements, the attorney general can issue a stop-work order.

Appeals

Anyone aggrieved by a citation or order may appeal to the attorney general and the division of administrative law appeals. A hearing officer may vacate or modify the citation or order if the aggrieved person demonstrates by a preponderance of the evidence that it was issued erroneously. Anyone aggrieved by a hearing officer's decision may then appeal to the state's superior court.

If the hearing officer decides to debar or suspend the contractor, it does not take effect for 30 days. However, the contractor cannot bid on any public construction work during that time unless the superior court temporarily enjoins the debarment or suspension order.

Penalty Options

The attorney general may apply for a criminal complaint or seek an indictment against anyone who, within certain deadlines, fails to comply with a citation or order or fails to pay a required civil penalty or restitution. If a civil penalty remains unpaid beyond certain deadlines, the law creates a tax lien on the real and personal property of the person who failed to pay. In addition, an officer of a

corporation that failed to pay a penalty cannot incorporate or serve as an officer in any corporation that did not legally exist when the fine became due.

New York

New York's prevailing wage law authorizes the fiscal officer (the labor commissioner or, for large cities, the city comptroller) to conduct compliance investigations into whether contractors (or subcontractors) have paid the required prevailing wages and benefits and met work-hour requirements ([N.Y. Lab. Law § 220](#)). The fiscal officer may initiate an investigation on his or her own initiative but must do so upon receiving a written verified complaint. The law authorizes the fiscal officer (and his or her agents) to examine any pertinent books and records. It deems the fiscal officer to be acting in a judicial capacity and authorizes him or her to issue subpoenas, administer oaths, and examine witnesses.

The investigation must include an inquiry into the contractor's willfulness regarding the alleged violation. If a formal hearing is held, the officer must determine the willfulness of the violation upon reviewing the entire record and finding credible evidence. A finding of willfulness in the proceeding is not dispositive in a criminal prosecution.

Hearings

Before issuing an order or determination, the fiscal officer must hold a hearing. The officer must serve notice of the hearing, with a copy of the complaint or a statement of the facts disclosed during the investigation, to the contractor personally or by mail. The contractor must have an opportunity to be heard about the matter, but the hearing must be expeditiously conducted.

Orders and Appeals

Upon the hearing, the officer must determine the issues raised and make and file an order stating the determination. The order must direct payment of any wages and benefits found due, plus applicable interest. The order may also impose an additional civil penalty. In assessing a civil penalty, the officer must consider the size of the employer's business, history of previous violations, and the gravity of the violation, among other things. Once the fiscal officer enters the order, any party aggrieved by it may appeal to the state's Appellate Division courts.

The fiscal officer must make any order, determination, or other disposition, including an agreed upon settlement or stipulation, within six months after the complaint was filed or the officer self-initiated the investigation. The officer must send a copy of the decision to the parties by certified mail, return receipt requested.

Contractors are debarred if they have two final determinations within six consecutive years for willfully failing to pay prevailing wages and benefits. However, if the final determination involves falsifying payroll records or wage and benefit kickbacks, then one determination triggers debarment ([N.Y. Lab. Law § 220-B](#)). (Contractors are also debarred for conviction of certain criminal offenses, which presumably follow the procedures required by the state’s criminal law.)

Ohio

Ohio’s prevailing wage law authorizes the state’s commerce director to investigate any alleged violations. The director may investigate upon his or her own motion but must do so if an employee on a public works project properly files a written complaint alleging that he or she had been paid less than the required prevailing wage ([Ohio Rev. Code § 4115.13](#)). A complaint must include documented evidence that the employee was paid less than the prevailing wage ([Ohio Rev. Code § 4115.10](#)).

After the investigation, the director must determine if the alleged violation occurred. If it was an intentional violation, the director must send a written notice to the subject contractor (or subcontractor) about the determination and inform the contractor that it may appeal the determination ([Ohio Rev. Code § 4115.13](#)).

Appeals

If the contractor timely appeals the determination, the director must schedule the matter for a hearing. The law authorizes the director to hold hearings and requires them to be in the same county where the alleged violation occurred. It allows the director to designate a hearing examiner, who must, after notifying the parties, conduct a hearing and make findings of fact and recommendations to the director. The director must then prepare a decision and send it to the parties.

If the contractor does not appeal in time, the director must adopt the investigation’s determination as a finding of fact upon which he or she bases the subsequent decision.

Intentional Violations

If the director’s decision finds that the contractor intentionally violated the prevailing wage law’s requirements, the law prohibits the contractor from (1) contracting with a public authority to construct a public improvement and (2) performing any work on a public improvement. In determining whether a contractor intentionally violated the law, the director may consider evidence of whether prior to the violation, (1) the director notified the contractor about the same or a similar violation or (2) the contractor made a reasonable effort to ascertain a correct interpretation of the prevailing wage law from the director.

Under the law, an intentional violation is a willful, knowing, or deliberate failure to comply. It includes intentionally:

1. failing to submit the required reports or knowingly submitting false or erroneous reports,
2. misclassifying employees to reduce wages,
3. misclassifying employees as independent contractors or apprentices,
4. failing to pay the prevailing wage,
5. failing to comply with the allowable ratio of apprentices to skilled workers required by law, or
6. allowing a debarred contractor to work on the project.

The contractor may appeal the decision to the court of common pleas in the county in which the hearing occurred but must file a bond with the court for the amount of restitution, conditioned upon payment if the court upholds the director's decision.

Contractor statements and the director's determinations, recommendations, and findings of fact are not admissible in certain criminal actions brought against the contractor ([Ohio Rev. Code § 4115.13](#)).

Investigation Authority and Debarment List

The law authorizes the director, and his or her designated representatives and hearing examiners, to administer oaths; take and require witness depositions; issue subpoenas; and compel witness attendance, document production, and testimony for investigations. For a failure or refusal to comply, the director may apply for a court order. Failure to obey the court order may be punishable by the court as contempt ([Ohio Rev. Code § 4115.132](#)).

The law requires the director to file with the secretary of state a list of contractors that have been prosecuted and convicted for violations or found to have intentionally violated the prevailing wage law. The director cannot include a contractor on the list until their time to appeal has expired. Contractors on the list are debarred ([Ohio Rev. Code § 4115.133](#)).

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