STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES
Prevailing Wage
PO Box 44540 • Olympia, Washington 98504-4540
360/902-5335 Fax 360/902-5300

July 24, 2018

Danielle Franco-Malone
Schwerin Campbell Barnard Iglitzin & Lavitt LLP
18 West Mercer Street, Suite 400
Seattle, WA 98119

Re: Northwest Ironworkers – Employers PTO Plan
SCBIL File No. 2928-055

Dear Ms. Franco-Malone:

Thank you for your May 4, 2018 correspondence on behalf of your client, the Ironworkers District Council of the Pacific Northwest, regarding the Northwest Ironworkers-Employers PTO Plan. I provide this response as a determination of the Industrial Statistician under Washington's prevailing wage laws made pursuant to RCW 39.12.015. Enclosed is a copy of the Prevailing Wage Determination Request and Review Process. It outlines the procedures for requesting determinations and reviews of determinations.

As you know, Washington voters passed Initiative 1433 in November 2016. The initiative is now included in chapter 49.46 RCW, the Minimum Wage Act. In addition to increasing the minimum wage and creating other protections, it requires employers to provide their employees with paid sick leave. As you note in your correspondence, employees must accrue paid sick leave at a minimum rate of one (1) hour for every forty (40) hours worked under the new paid sick leave law. Paid sick leave must be paid to employees at their normal hourly compensation and available for use beginning on the 90th calendar day after the start of their employment. Unused paid sick leave of 40 hours or less must be carried over to the following year, but need not be cashed-out at separation. Notwithstanding these requirements, employers may provide employees with more generous carry over and accrual policies. During the rulemaking process, the department also provided two provisions that are pertinent to our analysis here. The department recognized that PTO programs may comply with paid sick leave requirements if they meet criteria set forth in paid sick leave laws and rules. WAC 296-128-700. The Department also provided a provision to allow employers to use third-party administrators to administer the paid sick leave requirements. WAC 296-128-740.

Turning to the substance of your request, I understand that you have asked the department to determine that the full contribution of leave provided by the PTO Plan in your client's CBA should be included in calculating the prevailing rate of wage—regardless of its use, and even though your client has also structured its plan to comply with the new paid sick leave required by I-1433 through the PTO plan. As you recognize, the PTO leave provided under the plan must be a "Usual Benefit" for purposes of chapter 39.12 RCW to be included in the prevailing wage rate. For the reasons discussed below I conclude that if PTO leave may be accessed for vacation leave, even if a worker may also access it for statutory paid sick leave, then it is a usual benefit that can be included in determining the prevailing rate of wage. In reaching my conclusion, I considered your correspondence, the program's prior communications on this subject as well as the applicable legal provisions .

RCW 39.12.010(1) defines "the prevailing rate of wage" as the rate of hourly wage, usual benefits, and overtime paid in the locality to the majority of workers, laborers, or mechanics, in the same trade or occupation. RCW 39.12.010(3) and WAC 296-127-014 provide guidance on what constitutes a usual benefit. The department also previously provided guidance about what constitutes a usual benefit and how it should be calculated in two determinations dated February 28, 2013. These determinations are available on the department's web site at:

https://www.lni.wa.gov/TradesLicensing/PrevWage/Policies/.

Usual benefits as defined under RCW 39.12.010 must meet certain criteria. Paragraph (3)(a)describes "contributions irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program." Paragraph (3)(b) discusses costs which "may be reasonably anticipated in providing benefits to workers, laborers, and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in writing . . ." In addition, the paragraph (3)(b) lists a series of specific types of benefits, including "medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs . . . ." Usual benefits also include "other bona fide fringe benefits, *but only where the contractor or subcontractor is not required by other federal, state, or local law to provide any of such benefits*." (emphasis added).

WAC 296-127-014 provides further guidance. Under WAC 296-127-014, the department has long interpreted "usual benefits" to apply to five specific categories: (a) health and welfare payments, (b) retirement payments, (c) vacation payments, (d) payments into an apprenticeship training fund, and (e) paid holidays. Although inclusive, these provisions provide a number of limiting standards. For one, a payment must reasonably be described as a "usual benefit." The term implies both that a payment is customary in the industry ("usual"), and that the payment must provide an added value ("benefit") to the worker.

Second, if a benefit is not one specifically listed under the statute, it should be of the same general type as those which are listed.

Two requirements of the "usual benefits" provisions suggest that PTO leave that is available for statutory sick leave might not be a "usual benefit." First, if the benefit is required by "other local, state, or federal laws," historically, the benefit is excluded under the prevailing wage law. Prior to the passage of 1433, these would include benefits such as industrial insurance and unemployment benefits. Second, the department has previously advised employers that paid sick leave is not one of the benefits (or similar to one of the other benefits) identified by the WAC's definitions.

But usual benefits under RCW 39.12.010 and WAC 296-127-014(3)(c) include vacation payments made either directly to the employee or into a vacation fund, "provided these benefits are paid to the employees." The PTO Plan at issue here provides an irrevocable vacation fund, which means they are paid to the employees. This provision suggests that PTO Plan must be considered a usual benefit for purposes of chapter 39.12 RCW. Notably, your client's PTO plan can be for sick leave purposes, but can alternatively be used in its entirety for paid vacation benefits.

The administrative rules for paid sick leave under PTO plans contemplate the possibility that the benefit might be exhausted through use as vacation time, and so not be available for sick leave

> *(2) If an employee chooses to use their PTO leave for purposes other than those authorized under RCW 49.46.210 (1)(b) and (c), and the need for use of paid sick leave later arises when no additional PTO leave is available, the employer is not required to provide any additional PTO leave to the employee as long as the employer's PTO program meets or exceeds the provisions of RCW 49.46.200 and 49.46.210, and all applicable rules.*

WAC 296-127-700 (emphasis added).

Under the paid sick leave law, the entire accrued PTO leave may be used for vacation at the employee's option, but may also satisfy the paid sick leave requirements mandated by the paid sick leave laws if certain requirements are met. We must harmonize related statutory provisions to effectuate a consistent statutory scheme that maintains the integrity of the respective statutes. State v. Velasquez, 176 Wn.2d 333, 336, 292 P.3d 92 (2013). Vacation is specifically included as a usual benefit, but fringe benefits required by law are excluded. RCW 39.12.010(3)(b). The paid sick leave law requires minimum paid sick leave, but does not require a PTO Plan that allows leave to be used for illness (or other purposes provided under the paid sick leave law) or entirely for vacation time unrelated to any illness. Here, to harmonize the two provisions within (b), the most reasonable reading of the statute directs the department to treat PTO leave that may be used as vacation leave as vacation leave for

determining whether it is a usual benefit, even though it also may be used to satisfy paid sick leave requirements.

I agree that if there was any remaining ambiguity that reading the two provisions together to exclude PTO contributions would undermine the purpose of the usual benefit statute. Because RCW 39.12 is a remedial statute, I interpret it to favor the inclusion of PTO leave as a usual benefit. See also Everett Concrete Prod., Inc. v. Dep't of Labor & Indus., 109 Wn.2d 819, 823, 748 P.2d 1112 (1988).

In conclusion, I determine that a PTO Plan which irrevocably pays benefits into a fund, and which a worker may choose to use as vacation leave, is a usual benefit for the purposes of chapter 39.12 RCW. I will consider whether the rule should be updated to clarify the department's position that PTO leave may be treated as a usual benefit under certain circumstances.

Thank you for your letter regarding inclusion of contributions to the Northwest Ironworkers-Employers PTO Plan in the calculation of the prevailing rate of wage. Please be aware that Prevailing Wage Determinations are very fact specific, and if the facts are different than our understanding of them, the results of our analysis could be different as well. Please feel free to contact me if you have other questions concerning prevailing wage or if you require any further clarification.

Sincerely,

Jim P. Christensen
Industrial Statistician/Program Manager
Jim.Christensen@Lni.wa.gov
(360) 902-5330

Enclosures

cc: Steve Pendergrass
Chris McClain
Elizabeth Smith
Allison Drake
Sean Anderson
Laura Herman

Prevailing Wage Determination Request and Review Process

RCW 39.12.015 is the basis for requesting a determination, since it provides:

> All determinations of the prevailing rate of wage shall be made by the industrial statistician of the department of labor and industries.

If you disagree with a determination the industrial statistician provides, WAC 296-127-060(3) provides for a review process:

> (3) Any party in interest who is seeking a modification or other change in a wage determination under RCW 39.12.015, and who has requested the industrial statistician to make such modification or other change and the request has been denied, after appropriate reconsideration by the assistant director shall have a right to petition for arbitration of the determination.
>
> (a) For purpose of this section, the term "party in interest" is considered to include, without limitation:
>
> (i) Any contractor, or an association representing a contractor, who is likely to seek or to work under a contract containing a particular wage determination, or any worker, laborer or mechanic, or any council of unions or any labor organization which represents a laborer or mechanic who is likely to be employed or to seek employment under a contract containing a particular wage determination, and
>
> (ii) Any public agency concerned with the administration of a proposed contract or a contract containing a particular wage determination issued pursuant to chapter 39.12 RCW.
>
> (b) For good cause shown, the director may permit any party in interest to intervene or otherwise participate in any proceeding held by the director. A petition to intervene or otherwise participate shall be in writing, and shall state with precision and particularity:
>
> (i) The petitioner's relationship to the matters involved in the proceedings, and
>
> (ii) The nature of the presentation which he would make. Copies of the petition shall be served on all parties or interested persons known to be participating in the proceeding, who may respond to the petition. Appropriate service shall be made of any response.

If you choose to utilize this review process, you must submit your request within 30 days of the date of the applicable industrial statistician's determination or response to your request for modification or other change. Include with your request any additional information you consider relevant to the review.

Direct requests for determinations, and for modification of determinations via email or letter to the prevailing wage industrial statistician:

Jim P. Christensen
Industrial Statistician/Program Manger
Department of Labor & Industries
Prevailing Wage
P O Box 44540
Olympia, WA 98504-4540
Jim.Christensen@Lni.wa.gov

Direct requests via email or letter seeking reconsideration (redetermination) by the assistant director to:

Elizabeth Smith, Assistant Director
Department of Labor & Industries
Fraud Prevention and Labor Standards
P O Box 44278
Olympia, WA 98504-4278
Elizabeth.Smith@Lni.wa.gov

Direct petitions for arbitration to:
Joel Sacks, Director
Department of Labor & Industries
P O Box 44001
Olympia, WA 98504-4001

If you choose to utilize this arbitration process, you must submit your request within 30 days of the date of the applicable assistant director's decision on reconsideration (redetermination). Submit an original and two copies of your request for arbitration to the Director personally, or by mail. The physical address for the Director is 7273 Linderson Way, SW, Tumwater, WA 98501.

WAC 296-127-061 also contains the following provisions regarding petitions for arbitration:

In addition, copies of the petition shall be served personally or by mail upon each of the following:

(a) The public agency or agencies involved,

(b) The industrial statistician, and

(c) Any other person (or the authorized representatives of such person) known to be interested in the subject matter of the petition.

(2) The director shall under no circumstances request any administering agency to postpone any contract performance because of the filing of a petition. This is a matter which must be resolved directly with the administering agency by the petitioner or other party in interest.

(3) A petition for arbitration of a wage determination shall:

(a) Be in writing and signed by the petitioner or his counsel (or other authorized representative), and

(b) Identify clearly the wage determination, location of project or projects in question, and the agency concerned, and

(c) State that the petitioner has requested reconsideration of the wage determination in question and describe briefly the action taken in response to the request, and

(d) Contain a short and plain statement of the grounds for review, and

(e) Be accompanied by supporting data, views, or arguments, and

(f) Be accompanied by a filing fee of $75.00. Fees shall be made payable to the department of labor and industries.

RCW **39.12.015** Industrial statistician to make determinations of prevailing rate.

(1) All determinations of the prevailing rate of wage shall be made by the industrial statistician of the department of labor and industries.

(2) The time period for recovery of any wages owed to a worker affected by the determination is tolled until the prevailing wage determination is final.

(3) Notwithstanding RCW **39.12.010**(1), the industrial statistician shall establish the prevailing rate of wage by adopting the hourly wage, usual benefits, and overtime paid for the geographic jurisdiction established in collective bargaining agreements for those trades and occupations that have collective bargaining agreements. For trades and occupations with more than one collective bargaining agreement in the county, the higher rate will prevail.

(4) For trades and occupations in which there are no collective bargaining agreements in the county, the industrial statistician shall establish the prevailing rate of wage as defined in RCW **39.12.010** by conducting wage and hour surveys. In instances when there are no applicable collective bargaining agreements and conducting wage and hour surveys is not feasible, the industrial statistician may employ other appropriate methods to establish the prevailing rate of wage.

[2018 c 248 § 1; 2018 c 242 § 1; 1965 ex.s. c 133 § 2.]

NOTES:

Reviser's note: This section was amended by 2018 c 242 § 1 and by 2018 c 248 § 1, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW **1.12.025**(2). For rule of construction, see RCW **1.12.025**(1).

WAC 296-128-700

Paid time off (PTO) programs.

(1) Paid time off (PTO) provided to employees by an employer's PTO program (e.g., a program that combines vacation leave, sick leave, or other forms of leave into one pool), created by a written policy or a collective bargaining agreement, satisfies the requirement to provide paid sick leave if the PTO program meets or exceeds the provisions of RCW **49.46.200** and **49.46.210**, and all applicable rules, including:

(a) Accrual of PTO leave at a rate of not less than one hour for every forty hours worked as an employee;

(b) Payment for PTO leave at the employee's normal hourly compensation;

(c) Carryover of at least forty hours of accrued, unused PTO leave to the following year ("year" as defined at WAC **296-128-620**(6));

(d) Access to use PTO leave for all the purposes authorized under RCW **49.46.210** (1)(b) and (c); and

(e) Employer notification and recordkeeping requirements set forth in WAC **296-128-010** and **296-128-760**.

(2) If an employee chooses to use their PTO leave for purposes other than those authorized under RCW **49.46.210** (1)(b) and (c), and the need for use of paid sick leave later arises when no additional PTO leave is available, the employer is not required to provide any additional PTO leave to the employee as long as the employer's PTO program meets or exceeds the provisions of RCW **49.46.200** and **49.46.210**, and all applicable rules.

[Statutory Authority: RCW **49.46.810**. WSR 17-21-092, § 296-128-700, filed 10/17/17, effective 1/1/18.]

WAC 296-128-740

Third-party administrators.

(1) Employers may contract with a third-party administrator in order to administer the paid sick leave requirements under RCW **49.46.200** and **49.46.210**, and all applicable rules.

(2) Employers are not relieved of their obligations under RCW **49.46.200** and **49.46.210**, and all applicable rules, if they elect to contract with a third-party administrator to administer paid sick leave requirements. With the consent of employers, third-party administrators may pool an employee's accrued, unused paid sick leave from multiple employers as long as the accrual rate is at least equal to one hour of paid sick leave for every forty hours worked as an employee. For example, if a group of employers have employees who perform work for various employers at different times, the employers may choose to contract with a third-party administrator to track the hours worked and rate of accrual for paid sick leave for each employee, and pool such accrued, unused paid sick leave for use by the employee when the employee is working for any employers in the same third-party administrator network.

(3) A collective bargaining agreement may outline the provisions for an employer to use a third-party administrator as long as such provisions meet all paid sick leave requirements under RCW **49.46.200** and **49.46.210**, and all applicable rules.

[Statutory Authority: RCW **49.46.810**. WSR 17-21-092, § 296-128-740, filed 10/17/17, effective 1/1/18.]

RCW **39.12.010** Definitions.

(1) The "prevailing rate of wage", for the intents and purposes of this chapter, shall be the rate of hourly wage, usual benefits, and overtime paid in the locality, as hereinafter defined, to the majority of workers, laborers, or mechanics, in the same trade or occupation. In the event that there is not a majority in the same trade or occupation paid at the same rate, then the average rate of hourly wage and overtime paid to such laborers, workers, or mechanics in the same trade or occupation shall be the prevailing rate. If the wage paid by any contractor or subcontractor to laborers, workers, or mechanics on any public work is based on some period of time other than an hour, the hourly wage for the purposes of this chapter shall be mathematically determined by the number of hours worked in such period of time.

(2) The "locality" for the purposes of this chapter shall be the largest city in the county wherein the physical work is being performed.

(3) The "usual benefits" for the purposes of this chapter shall include the amount of:

(a) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program; and

(b) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to workers, laborers, and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in writing to the workers, laborers, and mechanics affected, for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other federal, state, or local law to provide any of such benefits.

(4) An "interested party" for the purposes of this chapter shall include a contractor, subcontractor, an employee of a contractor or subcontractor, an organization whose members' wages, benefits, and conditions of employment are affected by this chapter, and the director of labor and industries or the director's designee.

[**1989 c 12 § 6; 1985 c 15 § 1; 1965 ex.s. c 133 § 1; 1945 c 63 § 3;** Rem. Supp. 1945 § 10322-22.]

NOTES:

Severability—1985 c 15: See note following RCW **39.12.065**.

WAC 296-127-014

Usual benefits.

(1) Employers are not required to establish "usual benefit" programs. If an employer chooses not to provide such benefits, however, wages paid must be at the full prevailing wage rate as defined by RCW **39.12.010**.

(2) To be deemed a "usual benefit," the following requirements must be satisfied:

(a) Employer payments for the usual benefit shall be made only in conformance with all applicable federal and state laws, including the requirements of the Employment Retirement Income Security Act of 1974, as amended, and of the Internal Revenue Service; and

(b) Employee payments toward the usual benefit, through self-contribution, payroll deduction, or otherwise, shall not constitute a credit to the employer for prevailing wage purposes.

(3) "Usual benefits" are limited to the following:

(a) Health and welfare payments. This is medical insurance, which may include dental, vision, and life insurance. Insurance programs providing protection against industrial accidents or occupational illnesses which are mandated by state or federal statutes, and all related mandatory forms of protection, shall not qualify as health and welfare insurance.

(b) Employer payments on behalf of a person employed for the purpose of providing retirement income.

(c) Vacation payments made either directly to the employees or into a vacation fund, provided these benefits are paid to the employees.

(d) Apprentice training fund. Payments made to training programs approved or recognized by the Washington state apprenticeship and training council.

(e) Paid holidays. Payments made to employees for specified holidays.

(4) Any fringe benefits required by other local, state, or federal laws do not qualify as "usual benefits."

[Statutory Authority: Chapters **39.04** and **39.12** RCW and RCW **43.22.270**. WSR 92-01-104, § 296-127-014, filed 12/18/91, effective 1/31/92; WSR 88-22-046 (Order 88-22), § 296-127-014, filed 10/31/88.]

RCW **49.46.210** Paid sick leave—Authorized purposes—Limitations—"Family member" defined.

(1) Beginning January 1, 2018, every employer shall provide each of its employees paid sick leave as follows:

(a) An employee shall accrue at least one hour of paid sick leave for every forty hours worked as an employee. An employer may provide paid sick leave in advance of accrual provided that such front-loading meets or exceeds the requirements of this section for accrual, use, and carryover of paid sick leave.

(b) An employee is authorized to use paid sick leave for the following reasons:

(i) An absence resulting from an employee's mental or physical illness, injury, or health condition; to accommodate the employee's need for medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition; or an employee's need for preventive medical care;

(ii) To allow the employee to provide care for a family member with a mental or physical illness, injury, or health condition; care of a family member who needs medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition; or care for a family member who needs preventive medical care; and

(iii) When the employee's place of business has been closed by order of a public official for any health-related reason, or when an employee's child's school or place of care has been closed for such a reason.

(c) An employee is authorized to use paid sick leave for absences that qualify for leave under the domestic violence leave act, chapter **49.76** RCW.

(d) An employee is entitled to use accrued paid sick leave beginning on the ninetieth calendar day after the commencement of his or her employment.

(e) Employers are not prevented from providing more generous paid sick leave policies or permitting use of paid sick leave for additional purposes.

(f) An employer may require employees to give reasonable notice of an absence from work, so long as such notice does not interfere with an employee's lawful use of paid sick leave.

(g) For absences exceeding three days, an employer may require verification that an employee's use of paid sick leave is for an authorized purpose. If an employer requires verification, verification must be provided to the employer within a reasonable time period during or after the leave. An employer's requirements for verification may not result in an unreasonable burden or expense on the employee and may not exceed privacy or verification requirements otherwise established by law.

(h) An employer may not require, as a condition of an employee taking paid sick leave, that the employee search for or find a replacement worker to cover the hours during which the employee is on paid sick leave.

(i) For each hour of paid sick leave used, an employee shall be paid the greater of the minimum hourly wage rate established in this chapter or his or her normal hourly compensation. The employer is responsible for providing regular notification to employees about the amount of paid sick leave available to the employee.

(j) Unused paid sick leave carries over to the following year, except that an employer is not required to allow an employee to carry over paid sick leave in excess of forty hours.

(k) This section does not require an employer to provide financial or other reimbursement for accrued and unused paid sick leave to any employee upon the employee's termination, resignation, retirement, or other separation from employment. When there is a

separation from employment and the employee is rehired within twelve months of separation by the same employer, whether at the same or a different business location of the employer, previously accrued unused paid sick leave shall be reinstated and the previous period of employment shall be counted for purposes of determining the employee's eligibility to use paid sick leave under subsection (1)(d) of this section.

(2) For purposes of this section, "family member" means any of the following:

(a) A child, including a biological, adopted, or foster child, stepchild, or a child to whom the employee stands in loco parentis, is a legal guardian, or is a de facto parent, regardless of age or dependency status;

(b) A biological, adoptive, de facto, or foster parent, stepparent, or legal guardian of an employee or the employee's spouse or registered domestic partner, or a person who stood in loco parentis when the employee was a minor child;

(c) A spouse;

(d) A registered domestic partner;

(e) A grandparent;

(f) A grandchild; or

(g) A sibling.

(3) An employer may not adopt or enforce any policy that counts the use of paid sick leave time as an absence that may lead to or result in discipline against the employee.

(4) An employer may not discriminate or retaliate against an employee for his or her exercise of any rights under this chapter including the use of paid sick leave.

[2017 c 2 § 5 (Initiative Measure No. 1433, approved November 8, 2016).]

NOTES:

Intent—Effective date—2017 c 2 (Initiative Measure No. 1433): See notes following RCW **49.46.005**.

RCW **49.46.200** Paid sick leave.

The demands of the workplace and of families need to be balanced to promote public health, family stability, and economic security. It is in the public interest to provide reasonable paid sick leave for employees to care for the health of themselves and their families. Such paid sick leave shall be provided at the greater of the newly increased minimum wage or the employee's regular and normal wage.

[2017 c 2 § 4 (Initiative Measure No. 1433, approved November 8, 2016).]

NOTES:

Intent—Effective date—2017 c 2 (Initiative Measure No. 1433): See notes following RCW **49.46.005**.

Page 819
109 Wn.2d 819
748 P.2d 1112, 28 Wage & Hour Cas. (BNA) 950,
115 Lab.Cas. P 56,218, 7 A.L.R.5th 1086
EVERETT CONCRETE PRODUCTS, INC., Appellant,
v.
DEPARTMENT OF LABOR & INDUSTRIES, Respondent.
No. 53879-4.
Supreme Court of Washington,
En Banc.
Jan. 21, 1988.

Page 820

David W. Wiley, Bellevue, Frederick T. Rasmussen, Seattle, for appellant.

Kenneth O. Eikenberry, Atty. Gen., Michael H. Weier, Asst., Dept. of Labor & Industries, Olympia, for respondent.

Richard H. Robblee, Seattle, for United Ass'n of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, amicus curiae, for respondent.

CALLOW, Justice.

Washington's prevailing wage law, RCW 39.12.010 et seq., provides that the wages paid to workers on public works projects must be not less than the prevailing wage for similar work in the locality where the labor on the public works project is performed. RCW 39.12.020. This case presents the issue of whether the prevailing wage law applies to the off-site manufacture of prefabricated items for use on a particular public works project.

In early fall, 1982, the Department of Transportation awarded Guy F. Atkinson Construction Co. (Atkinson) the contract for the Mt. Baker Ridge Tunnel Public Works Project. Under the terms of the contract, Atkinson was to excavate and construct a tunnel for the Interstate 90 highway in Seattle. The earth at the tunnel site is loose and could not be excavated by traditional methods. As a result, Atkinson designed and utilized concrete tunnel liners to provide a supportive ring in the tunnel during excavation.

In April 1983, Atkinson arranged to have Everett Concrete Products (ECP) manufacture the tunnel liners required for the Mt. Baker project. ECP agreed to manufacture 30,000 lineal feet of liners in accordance with measurements specified by Atkinson and the Department of Transportation. ECP manufactured the tunnel liners on

Page 821

special forms built to meet the size [748 P.2d 1113] and measurement requirements of the tunnel. The manufacture of the liners took place on these forms at ECP's plant in Everett. Atkinson then contracted with trucking companies to deliver the liners to the site of the project.

In May 1984, general counsel for the Washington and Northern Idaho Council of the Laborers' International Union of North America wrote to the Department of Labor and Industries (Labor and Industries) and asked whether the prevailing wage law applied to ECP's manufacture of tunnel liners for the Mt. Baker Project. In response to this inquiry, Labor and Industries sent an industrial statistician to inspect ECP's facility in Everett and the tunnel site in Seattle. After conferring with his

superiors, the statistician determined that the prevailing wage law did apply to ECP.

ECP challenged this determination, and the matter subsequently was referred for arbitration, pursuant to RCW 39.12.060 which provides in part:

[I]n case any dispute arises as to what are the prevailing rates of wages for work of a similar nature and such dispute cannot be adjusted by the parties in interest ... the matter shall be referred for arbitration to the director of the department of labor and industries ...

After a hearing, the administrative law judge (ALJ) upheld Labor and Industries' application of the prevailing wage law to ECP.

I

ECP contends that the ALJ erred in holding that the prevailing wage law applied to ECP. First, ECP argues that RCW 39.12 should not include off-site product manufacturers within its scope, except under certain narrow circumstances. Second, ECP asserts that the ALJ erred in characterizing ECP as a subcontractor rather than a materialman.

To determine the scope of Washington's prevailing wage law, we look first to the relevant statutory language. Service Employees Local 6 v. Superintendent of Pub.

Page 822

Instruction, 104 Wash.2d 344, 348, 705 P.2d 776 (1985). If a statute is unambiguous, its meaning must be derived from its language alone. Stewart Carpet Serv., Inc. v. Contractors Bonding & Ins. Co., 105 Wash.2d 353, 358, 715 P.2d 115 (1986). If the statute is ambiguous, resort may be had to other sources to determine its meaning. PUD 1 v. WPPSS, 104 Wash.2d 353, 369, 705 P.2d 1195, 713 P.2d 1109 (1985).

In this case the relevant statutory language is set forth in RCW 39.12.020, which provides in part:

The hourly wages to be paid to laborers, workmen or mechanics, upon all public works and under all public building service maintenance contracts of the state or any county, municipality or political subdivision created by its laws, shall be not less than the prevailing rate of wage for an hour's work in the same trade or occupation in the locality within the state where such labor is performed.

According to the language of the statute, prevailing wages must be paid to those employed "upon all public works". The ALJ in this case interpreted the phrase "upon all public works" in RCW 39.12.020 to include within its scope work performed off the actual site of the public works project. He held that the prevailing wage law could be extended to cover off-site workers as long as they were "employed in the performance of the contract."

ECP concedes that the prevailing wage law can be applied to off-site work on a public works project. However, it argues that the ALJ erred in extending the scope of RCW 39.12 to cover ECP's manufacture of tunnel liners. It contends that the prevailing wage requirement should be interpreted in accordance with decisions and regulations in other jurisdictions examining state prevailing wage laws and the federal prevailing wage law, the Davis-Bacon Act (40 U.S.C. § 276a et seq.). According to these decisions and regulations the prevailing wage requirement would only be imposed on off-site manufacturers having a sufficient nexus to the public works project. Relevant factors in determining whether such nexus exists should include physical location

Page 823

of the project site, the nature of the relationship between the parties[748 P.2d 1114] performing the work, and the characteristics of the product

itself. See 29 C.F.R. § 5.2(1) (1985); H.B. Zachry Co. v. United States, 344 F.2d 352, 360 (Cl.Ct.1965); City & Borough of Sitka v. Construction & Gen. Laborers Local 942, 644 P.2d 227, 232 (Alaska 1982).

II

The construction of the phrase "upon all public works" involves a question of law. Therefore, we may engage in de novo review, but should accord substantial weight to the agency interpretation. Franklin Cy. Sheriff's Office v. Sellers, 97 Wash.2d 317, 325, 646 P.2d 113 (1982).

RCW 39.12.020 does not specifically state whether prevailing wages must be paid to workers employed in the performance of a public works project who are not working on the actual project site. Thus, we must determine its scope from the applicable rules of statutory construction assisted by any interpretation previously given to the statute by the Attorney General or Labor & Industries.

RCW 39.12 is remedial and should be construed liberally. Southeastern Wash. Building & Constr. Trades Coun. v. Department of Labor & Indus., 91 Wash.2d 41, 44, 586 P.2d 486 (1978). A liberal construction should carry into effect the purpose of the statute. See State v. Douty, 92 Wash.2d 930, 936, 603 P.2d 373 (1979).

The purpose behind Washington's prevailing wage law can be discovered by understanding the purpose behind the federal prevailing wage law, the Davis-Bacon Act, 40 U.S.C. § 276a, which served as a model for RCW 39.12. Drake v. Molvik & Olsen Elec., Inc., 107 Wash.2d 26, 29, 726 P.2d 1238 (1986). The Davis-Bacon Act was enacted "to protect the employees of government contractors from substandard earnings and to preserve local wage standards ... The employees, not the contractor or its assignee, are the beneficiaries of the Act." Unity Bank & Trust Co. v. United States, 756 F.2d 870, 873 (Fed.Cir.1985). As stated

Page 824

in Building Trades Coun., 90 Wash.2d at 45, 586 P.2d 486:

a purpose of the Davis-Bacon Act was to provide protection to local craftsmen who were losing work because contractors engaged in the practice of recruiting labor from distant cheap labor areas.

This purpose will be served by extending the application of RCW 39.12 to off-site manufacturers involved in public works by preventing contractors from parceling out portions of the work to various off-site manufacturers as a means of avoiding the prevailing wage requirement.

Another canon of statutory construction provides that "when the legislature of a state adopts a statute which is identical or similar to one in effect in another state or country, the courts of the adopting state usually adopt the construction placed on the statute in the jurisdiction in which it originated." 2A N. Singer, Statutory Construction § 52.02 (4th ed. 1984). As noted, Washington's prevailing wage law is based on the Davis-Bacon Act, 40 U.S.C. 276a. Building Trades Coun., at 44, 586 P.2d 486. Thus, cases and regulations interpreting that act may be relevant and persuasive to an analysis of RCW 39.12. The Davis-Bacon Act provides that:

(a) The advertised specifications for every contract in excess of $2,000, to which the United States ... is a party, for construction, alteration, and/or repair, ... of public buildings or public works of the United States ... 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 Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to

the contract work in the city, town, village, or other civil subdivision of the State, in which the work is to be performed ... and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without [748 P.2d 1115] subsequent

Page 825

deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics ...

Although the Davis-Bacon Act limits application of the prevailing wage law to employees of contractors or subcontractors who are employed "directly upon the site of the work," the site of the work has been construed to encompass off-site manufacturing. 29 C.F.R. § 5.2(1) (1987) states that:

(1) The term "site of the work" is defined as follows:

(1) 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 and, as discussed in paragraph (1)(2) of this section, other adjacent or nearby property used by the contractor or subcontractor in such construction which can reasonably be said to be included in the "site".

(2) Except as provided in paragraph (1)(3) of this section, fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yards, etc., are part of the "site of the work" provided they are dedicated exclusively, or nearly so, to performance of the contract or project, and are so located in proximity to the actual construction location that it would be reasonable to include them.

(3) Not included in the "site of the work" are permanent home offices, branch plant establishments, fabrication plants, and tool yards of a contractor or subcontractor whose locations and continuance in operation are determined wholly without regard to a particular Federal or federally assisted contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, tool yards, etc., of a commercial supplier or materialman which are established by a supplier of materials for the project before opening of bids and not on the project site, are not included in the "site of the work". Such permanent, previously established facilities are not a part of the "site of the work", even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of a contract.

Page 826

ECP contends that the factors set forth in the regulations interpreting the Davis-Bacon Act should be applied to determine whether ECP's manufacture of tunnel liners should be subject to the requirements of RCW 39.12. ECP contends that because its plant is located 40 miles from the site of the Mt. Baker Tunnel site and in another county, and because ECP is involved in other projects besides the Mt. Baker tunnel, it should not be required to pay prevailing wages to its employees who are manufacturing tunnel liners.

ECP's argument would be persuasive if the language of RCW 39.12 was identical to that in the Davis-Bacon Act. However, a court need not adopt the construction placed on a similar statute in another state if the language of the statute in the adopting state is substantially different from the language in the original statute. 2A N Singer § 52.02. "A provision of the federal statute cannot be engrafted onto the state statute where the Legislature saw fit not to include such provision." Nucleonics Alliance, Local 1-369 v.

WPPSS, 101 Wash.2d 24, 34, 677 P.2d 108 (1984).

In this case, the Washington Legislature departed from the language of the Davis-Bacon Act when it enacted RCW 39.12. The Davis-Bacon Act provides for payment of prevailing wages to "mechanics and laborers employed directly upon the site of the work." 40 U.S.C. 276a (italics ours). In contrast, RCW 39.12.020 provides for payment of prevailing wages to "laborers, workmen or mechanics, upon all public works." The omission of the word "directly" from the language of RCW 39.12.020 leads to the conclusion that the Legislature intended the scope of the State prevailing wage law to be broader than that of the Davis-Bacon Act. ECP's reliance[748 P.2d 1116] on regulations interpreting the Davis-Bacon Act is misplaced.

Department of Transp. v. State Employees' Ins. Bd., 97 Wash.2d 454, 461, 645 P.2d 1076 (1982), noted that "there is the well known rule of statutory interpretation that the construction placed upon a statute by an administrative agency charged with its administration

Page 827

and enforcement, while not absolutely controlling upon the courts, should be given great weight in determining legislative intent." Here the Department of Labor and Industries interpreted RCW 39.12 in a regulation explaining the definition of "locality" as defined in RCW 39.12.010(2). WAC 296-127-020(3) provides:

The definition of "locality" in RCW 39.12.010(2) contains the phrase "wherein the physical work is being performed." The department interprets this phrase to mean the actual work site. For example, if materials are prefabricated in a county other than the county wherein the public works project is to be completed, the wage for the prefabrication shall be the prevailing wage for the county where the physical work of prefabrication is actually performed. Standard items for sale on the general market are not subject to the requirements of chapter 39.12 RCW.

(Italics ours.) Implicit in this rule is the assumption that off-site manufacturers may be subject to the prevailing wage law. As the Department of Labor and Industries noted in its brief, "[i]t makes no sense to explain how to calculate the rate for off-site prefabrication work if the rate does not apply to such work."

Finally, a 1967 Washington Attorney General's opinion interpreting RCW 39.12 stated that the phrase "upon all public works" should not limit the application of the prevailing wage requirement to employees working at the actual public works project site. 1967 AGO 15, at 6. This opinion responded to an inquiry concerning whether RCW 39.12 applies to subcontractors and the extent to which RCW 39.12 was applicable to prefabricated items construed to become part of a public works project. The opinion summarized its answer to these questions as follows:

The requirement of chapter 39.12 RCW that the "prevailing rate of wage" be paid to laborers, workmen or mechanics upon all public works of the state, or any county, municipality or political subdivision, is applicable to labor performed in an off-the-job-site prefabrication

Page 828

by employees of the prime contractor, subcontractor, or other persons doing or contracting to do the whole or any part of the work contemplated by the contract, provided that the prefabricated "item or member" is produced specially for the particular public works project and not merely as a standard item for sale on the general market.

1967 AGO 15, at 10. An Attorney General's opinion is not controlling, but is entitled to considerable weight. Bellevue

Firefighters Local 1604 v. Bellevue, 100 Wash.2d 748, 751, n. 1, 675 P.2d 592 (1984).

ECP urges the court to limit RCW 39.12 by restricting its application to on-site employers and those off-site employers having a sufficient nexus with the site of the public works project. We find a broader interpretation appropriate in view of the overall purpose behind RCW 39.12, significant differences in language between RCW 39.12.020 and comparable language in the Davis-Bacon Act, and the prior interpretations of RCW 39.12 by the Department of Labor and Industries and the Attorney General.

III

ECP also challenges the ALJ's classification of ECP as a subcontractor rather than a materialman. The ALJ stated that employers supplying materials to public works projects are not required to pay their employees prevailing wages, but held that ECP was a subcontractor, as defined in Neary v. Puget Sound Eng'g Co., 114 Wash. 1, 8, 194 P. 830 (1921). Neary stated that a subcontractor is "one who takes from the principal contractor a specific part of the work." The ALJ determined that ECP fit this definition because it "took the raw materials of sand and gravel and cement and by the application of a particular [748 P.2d 1117] process turned them into a unique product capable of being used largely only on the Mt. Baker Ridge Tunnel."

Although the ALJ held that the prevailing wage law does not apply to materialmen, this result is not mandated by the language of the statute. RCW 39.12.030 states:

The specifications for every contract for the construction, reconstruction, maintenance or repair of any public

Page 829

work to which the state or any county, municipality, or political subdivision created by its laws is a party, shall contain a provision stating the hourly minimum rate of wage, not less than the prevailing rate of wage, which may be paid to laborers, workmen or mechanics in each trade or occupation required for such public work employed in the performance of the contract either by the contractor, subcontractor or other person doing or contracting to do the whole or any part of the work contemplated by the contract, and the contract shall contain a stipulation that such laborers, workmen or mechanics shall be paid not less than such specified hourly minimum rate of wage.

(Italics ours.) This language should be contrasted with the Davis-Bacon Act, which limits the application of prevailing wage requirements to employees of contractors and subcontractors. See 40 U.S.C. § 276a(a). Because of the inclusion of the phrase "or other person doing or contracting to do the whole or any part of the work contemplated by the contract" in RCW 39.12.030, Washington's prevailing wage law should not be limited in application to employees of contractors and subcontractors, but can be extended to include employees of materialmen in certain situations.

RCW 39.12.030 has been so construed. The 1967 Attorney General's opinion stated that the prevailing wage requirements of RCW 39.12 apply to materialmen engaged in the manufacture of prefabricated items produced specifically for a particular public works project. 1967 AGO 15, at 6, 7. The opinion distinguished between the off-site production of standard materials to be used in a public works project and the off-site manufacture of items manufactured specifically for a project.

It is asserted that the Attorney General's opinion was misguided in its reliance on Hague v. Cleary, 48 P.2d 5 (1935) which was, according to the brief of appellant ECP, overruled sub silentio by Pacific Mfg. Co. v. Leavy, 14 Cal.App.2d 640, 58 P.2d 1292 (1936). Both cases involved a public works prevailing wage ordinance of the City and County of San Francisco. We note that Hague v.

Page 830

Cleary, supra, is from the California Supreme Court and that its decision could not be overruled by a decision of the California Court of Appeals either "sub silentio " or directly. We further note that the cases are not in conflict. Hague holds that when goods are manufactured for a public works contractor upon special order and not for the general market, the contract can be construed as one for labor. Pacific Mfg. held that millwork purchased by a general contractor for installation in a public school being built by the contractor was material furnished not in specific performance of a public work, but as the furnishing of a general purpose chattel. Pacific Mfg., a suit brought to compel payment for millwork by the city comptroller, does not mention Hague v. Cleary, supra. Hague does stand for the proposition that when off-site prefabrication of a component part takes place for specific use of the item on a specific public works project, then the prevailing wage ordinance of San Francisco applied, while Pacific Mfg. required the City to pay for millwork placed in a public school by the general contractor regardless of whether the millwork manufacturer complied with the ordinance. 1967 AGO 15 is not weakened by the rationale of Pacific Mfg.

While the Attorney General's adoption of the standard/nonstandard distinction to determine whether employees of off-site manufacturers are covered by the prevailing wage law is not determinative, this distinction was also made in WAC 296-127-020. WAC 296-127-020 states that "[s]tandard items for sale on the general market are not subject to the requirements of chapter 39.12 RCW", leading to the conclusion that [748 P.2d 1118] nonstandard items are covered under RCW 39.12.

ECP does not attack the validity of WAC 296-127-020, but challenges the application of the rule to ECP's manufacture of tunnel liners. The ALJ did not specifically refer to WAC 296-127-020 in applying the prevailing wage law to ECP, basing his holding instead on his determination that ECP was a subcontractor rather than a materialman. However, in reaching this conclusion, the ALJ noted:

Page 831

We discern then that the requirements of RCW 39.12 that the 'prevailing rate of wage' be paid to laborers, workmen or mechanics upon all public works of the state, or any county, municipality or political subdivision, is applicable to labor performed in an off the job site prefabrication by employees of the prime contractor or subcontractor provided that the prefabricated product is produced especially for the particular public works project and not merely as a standard item for sale on the general market.

(Italics ours.) The ALJ stated that "[t]he evidence in this case clearly indicates that although the process of manufacturing the items was unique, nonetheless the tunnel liners were produced to specifications provided by the prime contractor and used specifically on the tunnel project."

In determining that ECP was involved in the manufacture of a nonstandard item, the ALJ was making a finding of fact, rather than a conclusion of law. As such, his determination may be overturned only if it is clearly erroneous. Franklin Cy. Sheriff's Office v. Sellers, 97 Wash.2d 317, 324, 646 P.2d 113 (1982). A finding of fact is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Sellers, at 324, 646 P.2d 113 (quoting Ancheta v. Daly, 77 Wash.2d 255, 259-60, 461 P.2d 531 (1969)). In this case, the tunnel liners were made to measurement specifications provided by Atkinson specifically for the Mt. Baker Tunnel Project. ALJ's finding that the tunnel liners manufactured by ECP were nonstandard items was not clearly erroneous.

IV

RCW 39.12.020 provides that prevailing wages must be paid to workers "upon all public works." This language must be construed to require application of the prevailing wage requirement to off-site manufacturers, when they are producing nonstandard items specifically for a public works project. In this way the use of cheap labor from distant

Page 832

areas is avoided and the purpose of RCW 39.12 is not circumvented. Here ECP's manufacture of tunnel liners for the Mt. Baker Ridge Tunnel Public Works Project constituted the manufacture of nonstandard items for a public works project. The ALJ correctly held that ECP was required to pay employees who manufactured the tunnel liners prevailing wages in accordance with the requirements of RCW 39.12.

We affirm his decision.

PEARSON, C.J., and UTTER, BRACHTENBACH, DOLLIVER, DORE, ANDERSEN, GOODLOE and DURHAM, JJ., concur.

176 Wn.2d 333, STATE V. VELASQUEZ

[Nos. 85938-8; 85950-7. September 25, 2012, Argued . January 17, 2013. En Banc.]

THE STATE OF WASHINGTON ET AL., *Respondents*, v. ALYSHA V. VELASQUEZ, *Petitioner*. THE STATE OF WASHINGTON, *Respondent*, v. DOUGLAS P. HUTCHISON, *Petitioner*.

J.M. JOHNSON, J., delivered the opinion for a unanimous court. GORDON MCCLOUD, J., did not participate in the disposition of this case.

Jason M. Schwarz and Whitney Rivera (of *Snohomish County Public Defender Association*), for petitioners.

Mark K. Roe, *Prosecuting Attorney*, and Charles F. Blackman, *Deputy*, for respondent.

Author: Justice James M. Johnson.

We concur: Chief Justice Barbara A. Madsen, Justice Charles W. Johnson, Justice Susan Owens, Justice Mary E. Fairhurst, Justice Debra L. Stephens, Justice Charles K. Wiggins, Justice Steven C. Gonzàlez, Tom Chambers, Justice Pro Tem.James M. Johnson

En Banc

¶1 J.M. JOHNSON, J. -- Under chapter 10.05 RCW, a defendant charged with a misdemeanor or gross misdemeanor in a Washington court of limited jurisdiction may petition the court for deferred prosecution if the crime was the result of substance dependency or mental illness. After the defendant fulfills the statutory requirements, including completion of a treatment program, the judge may dismiss the charges. RCW 10.05.130 requires the appropriation of public funds "to provide investigation, examination, report and treatment plan for any indigent person who is unable to pay the cost of any program of treatment" within a deferred prosecution.

¶2 This case requires statutory interpretation of the term "treatment plan" as it appears in RCW 10.05.130. We must decide whether the legislature intended that public funds pay for the full course of treatment programs for such indigent defendants in deferred prosecutions or whether public funding is required only for a treatment plan document (as well as "investigation, examination, [and] report"). *«1»*

«1» RCW 10.05.130.

¶3 We affirm the superior court and hold that according to the plain and unambiguous language of RCW 10.05.130, the legislature did not intend to commit public funds for the full course of treatment programs for indigent defendants in deferred prosecutions.

FACTS AND PROCEDURAL HISTORY

¶4 In two separate cases, now consolidated, petitioners Douglas P. Hutchison and Alysha V. Velasquez were charged with driving under the influence in district court. Each petitioned for deferred prosecution and requested that the court distribute public funds to pay for their substance dependency treatment programs pursuant to RCW 10.05.130. In both cases, the courts granted deferred prosecutions and, finding the defendants indigent, authorized the payment of public funds for the full course of substance dependency treatment. Clerk's Papers (CP) at 149, 276, 291-92.

¶5 The superior court vacated the district court orders authorizing the expenditure of public funds for substance dependency treatment and remanded the matters to district court. CP at 3-4. The superior court held that RCW 10.05.130 is plain and unambiguous on its face and that the four areas covered by the statute (investigation, examination, report, and treatment plan) do not include the full course of treatment. «2» CP at 17-22. Petitioners filed notices of discretionary review with this court, which were granted. *State v. Snohomish County Dist. Court*, 172 Wn.2d 1023, 265 P.3d 155 (2011).

«2» The cost of treatment is quite variable, estimated at roughly $ 3,000, including inpatient and outpatient treatment as well as court and probation fees. Wash. Supreme Court oral argument, *State v. Velasquez*, No. 85938-8 (Sept. 25, 2012), at 34 min., 45 sec., *audio recording by* TVW, Washington State's Public Affairs Network, *available at* http://www.tvw.org.

STANDARD OF REVIEW

[1, 2] ¶6 This case requires statutory interpretation, which is an issue of law that we review de novo. *City of Seattle v. Burlington N. R.R.*, 145 Wn.2d 661, 665, 41 P.3d 1169 (2002). When interpreting a statute, we must first look to the statute's plain language. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). If the plain language is unambiguous, subject only to one reasonable interpretation, our inquiry ends. *Id.* A statute is not ambiguous merely because multiple interpretations are conceivable. *State v. Hahn*, 83 Wn. App. 825, 831, 924 P.2d 392 (1996). When statutory language is unambiguous, we do not need to use interpretive tools such as legislative history. *State v. Hirschfelder*, 170 Wn.2d 536, 548, 242 P.3d 876 (2010). Finally, related statutory provisions must be harmonized to effectuate a consistent statutory scheme that maintains the integrity of the respective statutes. *State v. Chapman*, 140 Wn.2d 436, 448, 998 P.2d 282 (2000).

ANALYSIS

A. Plain language of RCW 10.05.130

[3, 4] ¶7 chapter 10.05 RCW establishes a deferred prosecution program available to defendants charged with misdemeanors or gross misdemeanors in Washington courts of limited jurisdiction. RCW 10.05.010(1). This program encourages the treatment of defendants whose crimes are caused by treatable conditions such as alcoholism. *City of Richland v. Michel*, 89 Wn. App. 764, 768, 950 P.2d 10 (1998). This case requires us to interpret the section of the statute concerning funding for indigent defendants who would like to participate in the program but cannot afford treatment. RCW 10.05.130 provides that "[f]unds shall be appropriated from the fines and forfeitures of the court to provide investigation, examination, report and treatment plan for any indigent person who is unable to pay the cost of any program of treatment." Petitioners argue that the term "treatment plan" includes the entire course of treatment. This interpretation would require the court to distribute funds from its fines and forfeitures to pay for not only the initial investigation and reports, but also the full treatment program for all indigent defendants. Respondent argues that a "treatment plan" is simply a document describing the plan for the defendant's treatment. This interpretation would require the court to distribute funds from its fines and forfeitures for the investigation and reports, including the treatment plan document, but not the full course of treatment. The plain and unambiguous language of RCW 10.05.130 indicates that the legislature intended to commit public funds for the investigation, examination, report, and treatment plan document, but not the full course of treatment.

¶8 To be eligible for deferred prosecution, the defendant must petition the court at arraignment to enter the program. The defendant must "allege under oath in the petition that the wrongful conduct charged is the result of or caused by alcoholism, drug addiction, or mental problems for which the

person is in need of treatment and unless treated the probability of future recurrence is great . . . ." RCW 10.05.020(1). The defendant must then agree to pay the cost of diagnosis and treatment if financially able to do so. *Id.* If the judge approves the petition, the judge may continue the arraignment and refer the defendant for evaluation to an approved drug, alcohol, or mental treatment facility. RCW 10.05.030. The facility then conducts an investigation and examination to determine whether the person suffers from the problems described and if there is a probability that similar conduct will occur in the future if the problem is left untreated, whether extensive treatment is required, and whether the person is amenable to treatment. RCW 10.05.040.

¶9 After the investigation and examination, the facility makes a written report to the court stating its findings and recommendations. Importantly, "[i]f its findings and recommendations support treatment . . . , it shall also recommend a treatment or service plan setting out: (a) The type; (b) Nature; (c) Length; (d) A treatment or service time schedule; and (e) Approximate cost of the treatment . . . ." RCW 10.05.050(1). Finally, "[t]he report with the treatment or service plan shall be filed with the court and a copy given to the petitioner and petitioner's counsel." RCW 10.05.050(3).

¶10 Related statutory provisions must be harmonized to effectuate a consistent statutory scheme. *Chapman*, 140 Wn.2d at 448. Accordingly, the use of the term "treatment plan" in RCW 10.05.050 is instructive to an interpretation of the term in RCW 10.05.130. Under RCW 10.05.050, the facility first issues a preliminary report. Only if its findings support deferred prosecution does the facility create a treatment plan: a document that sets out the details of the treatment program, including its type, length, and cost. Thus, two separate reporting documents may be created and filed with the court: the report and the treatment plan.

¶11 RCW 10.05.060 is similarly instructive:

> If the report recommends treatment, the court shall examine the treatment plan. If it approves the plan and the petitioner agrees to comply with its terms and conditions and agrees to pay the cost thereof, if able to do so, or arrange for the treatment, an entry shall be made upon the person's court docket showing that the person has been accepted for deferred prosecution.

Here, "treatment plan" refers to a document drafted by the facility and reviewed by the trial court. In both RCW 10.05.050 and 10.05.060, "treatment plan" refers to a document, not the full course of treatment.

¶12 Petitioners argue that it would be absurd for the statute to authorize public funding for an evaluation and reports, knowing that the defendants could not afford treatment. In the 37 years of the statute's existence, public funding pursuant to RCW 10.05.130 has been rarely, if ever, requested or authorized. CP at 236-39. The legislature has established and funded other programs such as Washington's alcoholism and drug addiction treatment and support act. Charitable organizations and sliding scale payment options available through the treatment facilities have also provided treatment to indigent defendants, allowing them to benefit from deferred prosecutions. Under our interpretation of "treatment plan," a court may be required to fund an evaluation and reports if the defendant has not done so. The indigent defendant will then have to seek additional assistance to pay for any treatment program. Contrary to the petitioners' contention, this does not prevent indigent defendants from utilizing the deferred prosecution program and has not in the past.

¶13 RCW 10.05.130 is plain and unambiguous on its face. The procedure for entering the program, as well as implementing the provisions for indigent defendants, suggests that "treatment plan" is simply a document describing the plan of action for treatment. The plain and unambiguous language of

chapter 10.05 RCW demonstrates that the legislature did not intend to commit public funds for the full course of treatment for indigent defendants in deferred prosecutions.

B. Article VIII, Section 4 of the Washington State Constitution

[5] ¶14 Respondent further claims that committing public funds for investigations, examinations, reports, or treatment plans pursuant to RCW 10.05.130 is in contravention of the Washington State Constitution. As amended by the Eleventh Amendment, article VIII, section 4 of the Washington State Constitution provides, "No moneys shall ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law . . . ." This constitutional limitation also applies to counties. *Moore v. Snohomish County*, 112 Wn.2d 915, 920, 774 P.2d 1218 (1989). It appears that the legislature has never appropriated funds for investigations, examinations, reports, or treatment plans for indigent defendants in deferred prosecutions pursuant to RCW 10.05.130. Having disposed of this case on statutory interpretation grounds, we decline to reach this constitutional issue. *See Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 752, 49 P.3d 867 (2002) (noting that "if a case can be decided on nonconstitutional grounds, an appellate court should refrain from deciding constitutional issues").

CONCLUSION

¶15 We affirm the superior court, vacating the orders authorizing the expenditure of public funds for the investigation, examination, reports, and treatment programs of indigent defendants in deferred prosecutions, and remanding the matters to district court. We hold that according to the plain and unambiguous language of RCW 10.05.130, the legislature did not intend to commit public funds for the full course of treatment programs for indigent defendants in deferred prosecutions.

MADSEN, C.J.; C. JOHNSON, OWENS, FAIRHURST, STEPHENS, WIGGINS, and GONZàLEZ, JJ.; and CHAMBERS, J. PRO TEM., concur.

Schwerin Campbell Barnard Iglitzin & Lavitt LLP
ATTORNEYS AT LAW
Of Counsel Lawrence Schwerin
James D. Oswald

DANIELLE FRANCO-MALONE
franco@workerlaw.com

Original via email to jim.christensen@lni.wa.gov

May 4, 2018

Jim Christensen
Industrial Statistician and Prevailing Wage Program Manager
Washington State Department of Labor and Industries
Jim.Christensen@LNI.WA.GOV

RE: Northwest Ironworkers-Employers PTO Plan
SCBIL File No. 2928-055

Dear Mr. Christensen:

This letter follows up on previous correspondence regarding the Northwest Ironworkers-Employers PTO Plan ("the Plan"), and the inclusion of contributions to that plan in the prevailing rate of wage for Ironworkers. As you know, Washington's new paid sick leave law entitles employees to one hour of paid sick leave for every 40 hours worked. In order to make that new benefit meaningful for ironworkers who may work for multiple employers in any given year, the Ironworkers negotiated into their CBA an obligation for employers to make hourly contributions to a third-party trust for PTO leave which ensures that accrued benefits remain available even if employees frequently change contractors. This benefit is an essential part of the compensation and benefits package paid to union ironworkers in Washington. As described in more detail below, RCW 39.12.010(3)(a) clearly requires the full contribution to the PTO Plan to be included in calculating the prevailing wage.

The "prevailing rate of wage," as defined in RCW 39.12.010, includes "usual benefits." "Usual benefits" comprise:

> (a) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program; and
>
> (b) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to workers, laborers, and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in writing to the workers, laborers, and mechanics affected, for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs,

> or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other federal, state, or local law to provide any of such benefits.

RCW 39.12.010(3). It is undisputed that employer contributions to the PTO Plan are contributions that are "irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program." RCW 39.12.010(3)(a). Therefore, under the black letter of RCW 39.12.010(3)(a), contributions to the PTO Plan are "usual benefits" that must be included in the prevailing wage.

You have previously suggested that contributions to the PTO Plan might not be considered as "usual benefits" because the PTO Plan is a benefit required by law, which is excluded from prevailing wage calculations pursuant to RCW 39.12.010(3). It is true that the rate of costs reasonably anticipated by a contractor to provide benefits to workers (the benefits described in section 3(b)) are not included as part of the cost of "usual benefits" where those benefits are required by state, local, or federal law. However, contributions to the Ironworkers PTO Plan fall squarely within RCW 39.12.010(3)(a), rather than (3)(b). As noted, those contributions are "irrevocably made…to a trustee or to a third person pursuant to a fund, plan, or program." *Id.* The first prong of the definition of "usual benefits" addresses expenditures that are made irrevocably, whereas the second prong addresses *possible* expenses an employer anticipates incurring at some point in the future.[1] It is only that latter category of expenditures that will not be included as a "usual benefit" in calculating the prevailing wage if the benefit is required by law.[2] Contributions that are made irrevocably to a third party are *always* considered "usual benefits" that are included in the prevailing wage.

The Ironworkers MLA converts what under state law is a mere contingent liability (e.g. the possibility that an employer may have to pay sick leave) and converts it into an actual expenditure that the employer must pay as part of employees' hourly wage. Under the MLA, receipt of the benefit is not contingent on whether the employee actually takes time off for illness – it is a fixed expenditure that the contractor will inevitably incur, and which will translate into a cash equivalent benefit enjoyed by every worker. This distinguishes it from a benefit program that would be covered by part 3(b), where the cost is merely "reasonably anticipated" rather than "irrevocably made."

Because the exclusion for benefits required by law only applies to benefits covered by section 3(b), and the Ironworkers PTO plan in question clearly falls under section 3(a), the fact that the contributions might be required by law is of no consequence.

However, even were that not the case, the full contributions to the PTO Plan should be included in the prevailing wage calculation because the contributions contractors make to the

[1] Presumably, it is this same distinction that led L&I to properly include in the prevailing wage calculations contributions to the Ironworkers health and welfare fund, notwithstanding the fact that employers are required by law to provide most employees with health insurance coverage under the Affordable Care Act.

[2] "[W]here the legislature includes particular language in one section of a statute but omits it in another, the exclusion is presumed intentional." *Perez-Crisantos v. State Farm Fire & Cas. Co.*, 187 Wn.2d 669, 680, 389 P.3d 476 (2017).

PTO Plan are *not* "required by law" within the meaning of RCW 39.12.010(3)(b). The new paid sick leave law does not require contractors to make irrevocable contributions and instead only imposes obligations they must pay if and when employees fall ill and seek paid sick leave. The Ironworkers PTO benefit is thus more generous than what is required by law not only because the sheer dollar amount of the contributions greatly exceeds the minimums required by the paid sick leave law,[3] but also because it guarantees employees a cash contribution to an account that will be held in their names by a third party administrator, and which they may convert to cash in certain regularly recurring situations.[4] These contributions contractors make to the PTO Plan are *not* required by law. They are more generous and fundamentally different in kind than the contingent liability created under state law.

Finally, it is worth emphasizing that Washington Courts have held that the prevailing wage statute is remedial and should be liberally construed to affect its purpose, which is "to protect the employees of government contractors from substandard earnings and to preserve local wage standards."[5] Interpreting the statute so as to exclude the PTO contributions would undermine the purpose of the statute. The PTO contributions were negotiated as part of the overall wage increase the Union achieved in bargaining. As is common practice, the employer's bargaining agent and union first agreed upon the amounts of wage increases, and only after reaching agreement on those dollar amounts, allocated the particular amounts that would go toward various fringe benefits, including the PTO account. The union sacrificed money on the check in order to secure the PTO benefit and those contributions must be included in the prevailing wage contributions.[6]

Should you have any questions or concerns, please feel free to contact me.

Sincerely,

Danielle Franco-Malone
Counsel for the Ironworkers District Council of the Pacific Northwest

cc: Steve Pendergrass

[3] In Area 1, employees will accrue $76 in their PTO account for every 40 hours worked, significantly more than the $40.52 (the journeyman's rate of pay in Area 1) that the state law would require. In Area 2, employees will accrue $80 in their PTO account for every 40 hours worked, compared to the $36.21 (the journeyman's rate of pay in Area 2). And in Local 14, employees will accrue $60 in their PTO account for every 40 hours worked, compared to the $27.21 (the journeyman's rate of pay in Area 3).

[4] Section 5.09 of the PTO Plan sets forth the circumstances in which employees may convert their accrued PTO into a cash dispersal.

[5] *Supporters of Ctr., Inc. v. Moore*, 119 Wn. App. 352, 358, 80 P.3d 618 (2003) (citing *Everett Concrete Prod., Inc. v. Dep't of Labor & Indus.*, 109 Wn.2d 819, 823, 748 P.2d 1112 (1988)).

[6] Failing to treat the PTO contributions as part of the prevailing wage would mean that workers actually accepted a *decrease* in wages. For instance, reviewing the difference from January 1, 2017 to July 1, 2017 (the date the contract went into effect), in Local 14's area wages went from $32.89 to $32.64, in Local 29's area wages went from $36.71 to $36.21, and in Local 86's area wages remained at $40.52. This would obviously represent a *worsening* in workers' overall compensation but for the fact that in each of those areas, the employer began making hourly contributions to workers' PTO accounts.

18 West Mercer St, Ste 400 | (206) 285.2828 TEL
Seattle, Washington 98119 | (800) 238.4231 TEL
workerlaw.com | (206) 378.4132 FAX