



STATE OF WASHINGTON  
DEPARTMENT OF LABOR AND INDUSTRIES

Prevailing Wage  
PO Box 44540 • Olympia, Washington 98504-4540  
360/902-5335 Fax 360/902-5300

November 7, 2016

Mr. Jeffrey Bennett  
Direct Retirement Solutions  
421 Loudon Road  
Albany, NY 12211

Re: Request for an opinion regarding prevailing wage credit for public works projects

Dear Mr. Bennett:

Thank you for your letter dated June 16, 2016 requesting an opinion about whether contributions to the Government Contracts Benefits Trust (GCBT) qualify as usual benefits as defined in RCW 39.12.010(3). Enclosed is a copy of that law along with WAC 296-127-014 and a statement of policy issued in February 2013 regarding how to calculate usual benefits. Prevailing wage determinations are fact specific and analyses of benefits programs can be complex. While I do not have enough information for a full analysis of GCBT compliance with chapter 39.12 RCW, I can provide the following.

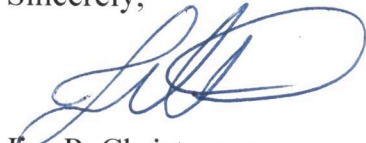
Usual benefits under RCW 39.12.010(3) include irrevocable contributions to a third party pursuant to a fund, plan or program and also may include costs to provide certain benefits to workers under certain circumstances. Your letter mentions such benefit purposes as health benefits, life insurance, disability insurance, apprentice training, and vacation and holiday pay. Those are acceptable usual benefits, according to RCW 39.12.010(3).

In your letter you state in certain circumstances “excess fringe benefit contributions made on behalf of such employee are paid to such employee as additional cash compensation.” Cash payments to workers are not “usual benefits” under RCW 39.12.010(3). RCW 39.12.020 explains the prevailing rate of wage is comprised of hourly wages, usual benefits and overtime. Excess contributions paid to employees in cash are wages. These additional wages must be properly factored into overtime calculations.

Jeffrey Bennett  
November 7 2016  
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I hope the foregoing observations are helpful to you. I would be pleased to provide additional information in response to specific questions about usual benefits under chapter 39.12 RCW. Also, a private attorney with experience in this area may be able to advise you further. Thank you for this opportunity to comment on the Government Contracts Benefit Trust.

Sincerely,



Jim P. Christensen  
Industrial Statistician and Prevailing Wage Program Manager  
Washington State Department of Labor and Industries  
[Jim.Christensen@LNI.WA.GOV](mailto:Jim.Christensen@LNI.WA.GOV)  
(360) 902-5330

Enclosures

cc: Elizabeth Smith, Assistant Director, Labor and Industries

**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.



## PREVAILING WAGE POLICY MEMORANDUM

**DATE:** February 28, 2013

**TO:** All Interested Parties

**FROM:** *LAS* L. Ann Selover, Industrial Statistician, Prevailing Wage Program Manager

**SUBJECT:** How to Calculate the Hourly Rate of Contribution for Usual (Fringe) Benefits as Part of the Prevailing Rate of Wage.

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### Policy Disclaimer

This policy is designed to provide general information in regard to the current opinions of the Department of Labor & Industries (L&I) on the subject matter covered. This policy is intended as a guide in the interpretation and application of the relevant statutes, regulations, and policies, and may not be applicable to all situations. This policy does not replace applicable RCW or WAC standards. If additional clarification is required, the Program Manager for Prevailing Wage should be consulted.

This document is effective as of the date of print and supersedes all previous interpretations and guidelines. Changes may occur after the date of print due to subsequent legislation, administrative rule, or judicial proceedings. The user is encouraged to notify the Program Manager to provide or receive updated information. This document will remain in effect until rescinded, modified, or withdrawn by the Director or his or her designee.

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**PREVAILING WAGE RATE:** The prevailing wage required under chapter 39.12 RCW to be paid on public work projects is defined under RCW 39.12.010(1) to include a “rate of hourly wage, **usual benefits**, and overtime.” As a result, usual benefits are recognized as part of the total wage rate when publishing the prevailing wage, and when gauging compliance with prevailing wage law. This document is intended to provide guidance to employers in determining which contributions qualify as usual benefits and how to calculate such benefits as part of the prevailing wage rate.

**USUAL BENEFITS:** Usual benefits are defined in RCW 39.12.010(3) and WAC 296-127-014 and include employer payments for medical insurance, pensions, approved apprenticeship training programs, vacation and holiday pay, and other bona fide benefits. Deductions from workers’ paychecks are not usual benefits. Usual benefits are employer paid. Benefits that are required by law (Industrial Insurance, Social Security, State Unemployment Compensation taxes, etc.) do not qualify as usual benefits.

Employers must pay a wage and usual benefit package that adds up to the published prevailing rate of wage for the work performed. Employers are not required to provide usual or fringe benefits, and if they do not, the total prevailing wage rate must be paid as an hourly wage. In any event, employer paid usual benefits cannot be applied to reduce the hourly wage paid to less than the state minimum wage. Please note special overtime and holiday rates may also be established for some trades and occupations.

- A. **Insurance (medical, dental, life, etc.):** Insurance premiums include **employer paid portions** of medical, dental, vision and life insurance benefits. Do not include insurance benefits that are employee paid through payroll deduction, workers' compensation premiums, unemployment insurance, or any other federally or state mandated payroll deductions.
- B. **Pension or retirement plans:** Pension and retirement contributions include **employer paid portions** of pension and retirement plans which are irrevocably made to a trustee or to a third person pursuant to a fund, plan, or program. Do not include pension or retirement benefits that are employee paid through payroll deductions.
- C. **Vacation and/or holiday:** Report **employer paid** vacation and/or holiday benefits. Do not include vacation fund deposits that are employee paid through a payroll deduction.
- D. **Apprenticeship programs:** Report **employer paid** contributions made to apprenticeship or training programs recognized by the Washington State Apprenticeship and Training Council.
- E. **Other bona fide programs:** Other **employer paid** programs may qualify as "usual benefits." Please consult with L&I prior to including payments to such programs in your reported wage rate.

See RCW 39.12.010, WAC 296-127-014 and WAC 296-127-01410.

**POSTING AND DOCUMENTATION:** Employers must comply with all posting and employee notification requirements provided by applicable federal and state laws concerning usual benefits plans. Employers must also have and make available to L&I upon request, copies of all documents concerning usual benefits identified in WAC 296-127-014. See WAC 296-127-01410. See also U.S. Department of Labor (U.S. DOL) Employee Benefits Security Administration Reporting and Disclosure Guide for Employee Benefit Plans.

**CALCULATING BENEFIT AMOUNTS – APPORTIONING BENEFITS TO HOURS WORKED:** Although "usual benefits" are defined under RCW 39.12.010(3), certain plans will require additional information on how benefit payments should be apportioned to hours worked. It has been the long-time position of L&I, consistent with the approach adopted by many other states and by the U.S. DOL with respect to most plans, that contributions made to a fringe benefit plan for public works should be based on the effective annual rate of contributions for all hours, public and private, worked during the year by an employee. In order to apportion benefits to hours worked, L&I will generally look at contributions and hours worked over the course of a year, assuming 2,080 hours per worker per year, unless an employer provides an alternate schedule and can document actual hours worked. This approach is sometimes called "annualization."

As the U.S. DOL manual explains the analogous principle under the Davis-Bacon Act (federal prevailing wage law), "...contributions made to a fringe benefit plan for government work generally may not be used to fund the plan for periods of non-government work." See Davis-Bacon and Related Acts and Contract Work Hours and Safety Standards Act Field Operations Handbook – 10/25/2010 at 15f11(b). For a basic example, if an employer places \$5,000 a year into a health plan for an employee, and the employee works a full time schedule of 2,080 hours, the credit is \$2.40/hr. Thus, the employer cannot say that the plan is *only* for public works, even if contributions are tied to public hours.

### **Examples Illustrating the Use of Different Annual Hours**

Suppose that an employer places \$5,000 a year into a health plan for an employee, and the employee works a full time schedule of 2,080 hours on a combination of public and private work. In order to obtain an hourly credit, the total contribution is divided by the total hours worked. Thus, at these rates, the hourly contribution is \$2.40/hr.

$$\$5,000 / 2080 = \$2.40$$

Alternatively, the worker may be a part time employee, and only slated to work 1600 hours in the year. In that case, the employer may use the employee's actual hours, with a resulting credit of \$3.13/hr.

$$\$5,000 / 1600 = \$3.125$$

The use of a full year is not possible for all benefit calculation situations. In these cases, another period may be allowed if an employer uses a consistent rate of contribution into a bona fide benefit plan, but has difficulty forecasting either the total worker hours or the total contributions for the year. Please contact L&I regarding such situations.

### **Special Provisions for Certain Defined Contribution Plans – "DOL Exception"**

For defined contribution pension plans that provide for a higher hourly rate of contributions to be made for prevailing wage covered work than for non-covered work, the higher rate paid for covered work will be fully credited toward satisfaction of the required prevailing wage rate only if the plan provides for immediate participation and an immediate or essentially immediate vesting schedule (e.g., 100% vesting after an employee works 500 or fewer hours). For such plans the hourly rate of credit is arrived at by calculating the total contributions made on behalf of each worker during the course of the public works project, and dividing that number by the number of hours worked by the same worker on the public works project. This exemption mirrors an exemption provided by the U.S. DOL in its administration of the Davis-Bacon Act.

**TIMELY DEPOSIT OF CONTRIBUTIONS TO BENEFIT PLANS:** Benefit plan contributions must be made on a regular basis, and no less often than quarterly.

**PERIOD USED ("YEAR") FOR ANNUALIZATION PURPOSES:** If your plan does not specify a time frame to calculate the credit toward the prevailing wage rate, in most instances L&I will use a calendar year. Otherwise, L&I may look to the time frame you use (e.g., a fiscal year, calendar year, plan year, etc.). The period you adopt must be reasonably consistent over time.

**CONTACT L&I FOR ANSWERS TO YOUR PLAN-SPECIFIC QUESTIONS:** If this explanation and the above examples do not cover your specific situation, please contact L&I for guidance on the appropriate calculation. Please direct your questions to the Prevailing Wage Office at (360) 902-5335 or by e-mail at [PW1@Lni.wa.gov](mailto:PW1@Lni.wa.gov).

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## **How to Calculate Benefit Contributions Based on L&I's Annualization Policy**

### **Example: Health, Pension and Apprentice Contributions Calculation**

An employer contributes \$10,000 towards a full-time employee's health care coverage from January 1, 2011 to December 31, 2011. A full-time employee works a total of 2,080 hours in a full-time year (52 weeks x 40 hours a week).

Calculation: \$10,000 paid during the year / 2,080 hours worked = **\$4.81**

**The amount to be reported for health coverage in this example is \$4.81 per hour. If the employer contributed an equivalent amount to an employee's pension plan during the year (except those plans that meet the "DOL Exception" noted above), the same calculation method would be used to obtain the rate to report for pension benefits.**

### **Example: Vacation and Holiday Calculation**

An employee works a total of 1,750 hours in a year and receives 2 weeks (80 hours) of paid vacation time from January 1, 2011, to December 31, 2011. The total amount received in paid vacation is \$1,050.

Calculation: \$1,050 total vacation pay / 1,750 total hours worked = **\$0.60**

**The amount to be reported for vacation in this example is \$0.60 per hour. If the employee received paid holidays during the year, the same calculation method would be used to obtain the rate to report for the holiday pay.**

L&I will assume 2,080 hours per year, per employee, in the absence of evidence to the contrary. If actual hours worked are substantially more than 2,080, or can be reasonably anticipated to be more than 2,080, actual hours must be used for the calculation. If an employer calculates using less than 2,080 hours per employee per year, it must be able to document the reduced schedule which provides the basis for the calculation.

## SUMMARY

- Employers must comply with all posting and employee notification requirements provided by applicable federal and state laws concerning usual benefits plans. Employers must also have and make available to L&I upon request, copies of all documents concerning usual benefits as identified in WAC 296-127-014. See WAC 296-127-01410.
- Usual benefits are credited on an hourly basis and are expected to accrue at a regular rate. Employers may not count benefits associated with public and private work as if they were only associated with public work projects. L&I will generally apportion or annualize benefit contribution or costs to all hours worked over the course of a year unless an employer provides an alternate schedule and can document actual hours worked. Certain defined contribution pension plans (DOL exception) do not need to meet this annualization requirement.
- Benefit contributions must be deposited on at least a quarterly basis.
- Basic Annualized Calculation Method: Divide the total yearly contributions made by the employer for each individual worker by 2,080 hours (40 hours per week X 52 weeks = 2,080 hours).
- Generally a calendar year is used in calculating credits toward the prevailing wage rate, but there may be instances when calculations are appropriately based on a fiscal year or plan year.



## **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.]

# Prevailing Wage Determination Request and Review Process

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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](mailto:Jim.Christensen@Lni.wa.gov)

# Prevailing Wage Determination Request and Review Process

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](mailto: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.